



# THE MILOŠEVIĆ TRIAL

*an autopsy*

*edited by*  
**TIMOTHY WILLIAM WATERS**

OXFORD

## The *Milošević* Trial



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*An Autopsy*

EDITED BY  
Timothy William Waters

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To my father, Raymond Montgomery Waters, Sr.,

24 January 1926–18 April 2011

Who was never quite sure what I was working on

Though he was always very proud of me for doing it;

And who didn't quite live long enough to see what it was:

I wish I'd worked a bit faster,

but I know he'd rather I took the time to do it right.

PCET

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## Preface: A Trial Terminated

### I. The Value of Examining the *Milošević* Trial— What This Book Addresses

*Prosecutor v. Slobodan Milošević* was to have been the flagship trial of the International Criminal Tribunal for the Former Yugoslavia, or ICTY. No figure more prominent was ever brought before the Tribunal; no other case addressed the bloody sweep of the Yugoslav wars so comprehensively, or made such consequential claims about the causes and course of those wars; no other trial received the attention or the resources that this one did; no other had the same expectations and hopes attached to it.

Those expectations were manifold and consequential: an accounting for great violence; a vindication for victims, and of justice; closure for those who lived through the annihilating wars of the Yugoslav dissolution; and a seal and imprimatur, too, for the ICTY itself. The *Milošević* trial was supposed to be the “capstone of the tribunal’s somewhat improbable rise from the margins of the international arena to that of a serious international institution.”<sup>1</sup>

And then, of course, in the proceedings’ fourth year, Milošević died.

It has been over seven years since the *Milošević* trial—one of the longest and most prominent war crimes trials of the modern era—was brought to an abrupt termination, leaving the Tribunal, the peoples of the former Yugoslavia, and the world without a definitive legal resolution. What many expected at the outset would be the Tribunal’s most

consequential trial might seem to have become a footnote. And so we are left with a puzzle: What became of all that this trial promised to do and to be?

This puzzle is precisely why the *Milošević* trial is worthy of closer examination. The expectations that ringed the trial were not merely inchoate and idle wishes; they were the logical expression of beliefs and theories about what a trial like this, and the institution that conducted it, could or should achieve. Examining what the *Milošević* trial actually was, what it did, and what it did not do therefore constitutes a natural experiment in how we deploy law in response to violent conflict.

That examination takes a specific form. The subtitle of this book is “an autopsy.” An autopsy implies a mystery unresolved, a question unanswered; it often implies suspicions of malefaction—or at least curiosity and a need to confirm, with precision, the course of events that led to an untimely end. We are concerned here not with the death of a man, but of the trial that bore his name; yet as with any death, we wish to know not only the details of demise, but the sum and legacy of all that preceded the end.

Through the lens of this single trial, this book examines a range of present and perennial problems arising at the ICTY, in international criminal law—ICL, as we will call it—and in transitional justice more broadly, as well as in the former Yugoslavia in particular. By examining different phases of the *Milošević* trial in their context—from the decision to investigate Milošević to the legacy his trial left on the institutional practice of the ICTY and the politics of the successors to the former Yugoslavia—we may better understand the processes and politics of investigating, indicting, arresting, and trying senior political figures, and the impact criminal trials have—or do not have—on reconciliation and transitional justice in regions torn by war.

Twenty years after the start of the Yugoslav crisis, ICL is an entrenched part of the general response to crises and of the post-conflict toolkit. With a permanent International Criminal Court (ICC) and numerous ad hoc courts adjudicating a variety of crimes, no major world conflict now plays out without calls to investigate, prosecute, and convict the leading participants. But what are the real effects of this effort? With the ICTY nearing completion of its work, and legacy issues involving its

trials on the agenda, it is an opportune time to consider the legacy and impact of the Tribunal through its most prominent trial.

There have been excellent studies of *Milošević*—including by authors represented in this book—but to date, no significant work has drawn together the many disciplines implicated in the study of international post-conflict justice to assess this, the single most important war crimes trial of the post–World War II era. A comprehensive examination of the *Milošević* trial’s impact therefore can make an important contribution to both academic study and policy consideration of ICL’s role in post-conflict justice.

As the first comprehensive cross-disciplinary assessment, *The Milošević Trial—An Autopsy* addresses a number of key issues with implications for assessing the work of the ICTY and for ICL more broadly, including:

- determining the role of historical truth-telling in war crimes trials;
- measuring the impact of trials on communities directly affected by war;
- refining courtroom strategies and the design of war crimes trials; and
- examining access to evidence by researchers, victim communities, and other courts.

*The Milošević Trial—An Autopsy* describes an arc, from assessing the past to planning for the future: from its initial chapters evaluating the course and context of the trial itself, through examination of the trial’s effects in the former Yugoslavia, to the final sections considering the trial’s impact on the future development of post-conflict justice. What was the trial supposed to achieve? Why did it develop in the way it did—what strategic choices affected the process? Most important, what is its legacy—for the ICTY, for ICL more broadly, for the peoples of the former Yugoslavia, and for our collective understanding of intervention in and after conflict?

## **II. The Grounds for Assessing the *Milošević* Trial —Essential Features**

The purpose of this book is to present a diverse range of views about *Milošević*, and with so many authors examining the body of the trial from different perspectives and toward divergent ends, it is a risky business to assert any common view. But two defining features of the trial, however contested, form the common ground for this book. The two features of *Milošević* with which any examination of the trial and its effects must grapple are the enormous expectations and outsized ambitions that surrounded the trial as it began, and the gravitational effect of its premature termination on our understanding of the trial process that preceded it. The meaning and implications of these two features are fundamentally contested—but it is the fact that they are contested in common which makes the *Milošević* trial relevant and consequential in the particular way it is, and that has determined the nature and structure of this book.

***The expectations and scope of the trial:*** The *Milošević* trial's stature was in part a function of the Accused's status and notoriety; the "Butcher of the Balkans" to some, to others the "[S]avior of the Serbs,"<sup>2</sup> *Milošević* was widely seen as the master architect of Yugoslavia's demise and violent dissolution. And he was universally seen as its single most dominant figure—*Milošević* denied many things in his trial, but never that. The trial also acquired a sense of moment and novelty as the first indictment and trial of a sitting head of state since the Second World War. The *Milošević* trial was also large, and it was ambitious. By the time he actually stood trial, *Milošević* stood accused of a range of crimes in all three major wars of the Yugoslav dissolution, covering every type of crime in the Tribunal's jurisdiction—more counts than any other indictee.

But the trial's deeper importance arose from the logical consequences of that case. The crimes alleged were no more shocking than those for which others were tried and convicted before the Tribunal—nor any less. They did not promise to break new ground in cataloguing the particular inhumanities the Yugoslav wars had produced—indeed, for the *Croatia* and *Bosnia* phases, the charges were largely derivative of crimes of other indictments and trials. Yet considered as a whole, the case—and the master theory under which it was brought—made the sum of those charges something of enormous greater potential value.

What mattered, what made this trial extraordinary, was the interconnectedness of these many, many crimes, and the story weaving

them together: What had been isolated, disparate acts, told and tested in separate trials, was now joined in a single case, under a single theory that implied a claim about the wars as a whole. The case that was brought against Milošević placed him at the very center of a web of criminality—indeed, it was Milošević’s place at the center that provided the legal and logical relationship between all the other acts and actors across three wars and the greater part of a decade. The Tribunal’s case information sheet lists 46 cases to which *Milošević* is related, from *Babić* to *Župljanin*—more than any other trial, and the only trial to link cases from all three of the other major conflicts the Tribunal adjudicated.\* Slobodan Milošević *was* the network.

In short, though Milošević was a single person tried in his individual capacity, his trial was also plausibly, almost necessarily, seen as the culmination of the Tribunal’s work, an indictment of the Serbian war project, and a summation of Yugoslavia’s dissolution.<sup>3</sup> From this fact proceeded many of the qualities so frequently observed in the trial, and that many of the chapters in this book address: its expansive, even bloviated nature; its unnavigable flood of documentary evidence; its interminability; but also its ambition, its depth and its comprehensiveness.

***The death of influence—The trial’s termination:*** The other fact that has defined our reception of *Milošević* was its premature termination. Every aspect of the trial has been marked by and is now viewed through the prism of its early end, which left open every question about what the trial was supposed to achieve. The meaning and value of the trial are therefore radically contested: for some, the mere fact that a sitting head of state had been indicted and tried reaffirmed the importance of ICL as a robust response to state criminality; for others, the collapse of this sprawling case demonstrated the insufficiency of judicial responses to complex mass violence.

Termination left the trial without judgment, and therefore without any definitive statement of Milošević’s role, evaluation of the evidence, or weighing of arguments—all the things that were supposed to have consequential effect.<sup>4</sup> *Milošević* was supposed to be the paramount trial of the ICTY, but more than seven years on, the case appears not to have exercised the kind of decisive, displacing influence on the broader jurisprudence of the Tribunal, on ICL more generally, or on post-conflict transition in the former Yugoslavia that was predicted. This non-effect is

itself worthy of close scrutiny: Clearly, this trial was supposed to have been of great consequence; if it was not, we must consider, why not?

For some, the answer to the puzzle of the trial's diminished influence is uninterestingly obvious: The trial's potential was contingent on its completion. This view preserves the tantalizing possibility that if only the trial had reached its conclusion, things might have been considerably different—its pessimism is medical. But this merely begs the question of what this trial—what a trial like this one—was supposed to do, and how: Under what conditions does ICL influence post-conflict societies? How does it contribute to reconciliation?

In particular, the *Milošević* trial's early termination has brought to the fore questions about the value of international trials as process. A trial that ends in a verdict exercises a displacing gravitational effect on the processes preceding judgment. By contrast, a trial that ends prematurely, as *Milošević* did, leaves those prior acts in their original state of salience; interim events take on a greater significance when nothing supersedes them, and we may therefore examine them to see what, if any, effect they have had independent of final judgment.

In contrast to interpretations that assume the *Milošević* trial's value depended on reaching a verdict, this kind of view—whether favorable to or critical of the Tribunal—is more structural, less subject to the physiological happenstance of mortality. For if a trial as process is itself of value, then it expresses that value by the very fact of occurring—and logically does so as it occurs, even before final judgment. On this view we would expect that the *Milošević* trial should have achieved certain things, perhaps contributed to reconciliation in certain ways. In the absence of judgment, the effects of process should be, in a way, falsifiable, or at least more visible; one therefore should either find these effects or discern, in their absence, a failure of the trial as process, which no verdict would have undone.

The authors in this book are arrayed along a complex spectrum in relation to these two factors—the expectations surrounding an ambitious trial, and the fact of its termination—but all, in their way, assess the trial's meaning and legacy in light of them.



### III. The Enigma of Influence: What We Talk about When We Talk about *Milošević*

Many chapters in this book take up the implicit question of what, exactly, the *Milošević* trial's effects were on the ICTY, ICL more generally, and the societies of the former Yugoslavia. This is fraught with risks: How can one say with confidence what a single trial has achieved, when it is embedded in the broader processes of the Tribunal, drawing on and interacting with its other trials? How can one assess a single trial's contribution to such an inchoate field as reconciliation—how would one measure that effect, assuming one could even isolate it?

Indeed, the criticism has occasionally been made that single prominent trials are given too much focus, and especially that when this trial ended, too much was made of that.<sup>5</sup> The same criticism might be made of this book—doesn't an entire volume on the *Milošević* trial simply replicate this error of attention, encouraging us to focus on prominent individuals and events, rather than attending to broader patterns?

In certain ways it is obviously impossible to separate out the effects of one trial from those of the institution, just as the institution's effects cannot be clearly distinguished from the complex mosaic of influences on the former Yugoslavia. And certainly the fact that *Milošević* was widely seen as the ICTY's flagship trial suggests a real danger of conflating the work and influence of the whole Tribunal—indeed, of the field of ICL—with a single prominent and highly politicized trial.<sup>6</sup>

At the same time, we necessarily assess the value of any institution by its discrete actions. And the irreducible methodological difficulties inherent in assessing the effects of a single trial do not give us license simply to assume its effects are positive; if the best one can say in defense of the *Milošević* trial or the Tribunal is that it is unfair to judge them too harshly because their effects are hard to isolate, well, that is thin gruel indeed. A robust evaluation of this one trial's legacy may be unattainable, but if we are to consider the claims that were in fact made for this trial and this Tribunal, it is also, equally, unavoidable.

The very fact that it is methodologically difficult to separate out the effects of trial from the Tribunal means that many critiques of the *Milošević* trial are also implicitly critiques of the institution. And here we

find a final reason that examining this single trial is a legitimate and valuable exercise: Whatever its institutional context, *Milošević*—like every trial—was consciously and ideologically designed to address a highly particular and individual question, namely the guilt or innocence of a single person. The Tribunal has fully embraced the theory of individual liability, and consistently declared that its goal is to move beyond collective frames for conflict precisely by adhering to a process focused on individualized guilt. The Tribunal's own claims to institutional legitimacy are premised, precisely, on its ability to assign guilt to individuals. For many people, the logic and attraction of individual liability in criminal trials is intuitive, but even so, consequences arise from this theory: Individual trials must work and matter for themselves, not only as components of a larger process. Focusing on the individual identity of accused and victims rather than the social, collective, and ethnic aspects of violence implies a choice about the aims of ICL, and an unavoidable choice among theories about the nature of the underlying violence, which cannot be isolated from the forensic work of the Tribunal.

Many authors in this book analyze the legacies of the trial—and many are skeptical that the trial had the effects originally ringed around it like promises, but all of the authors are cognizant of the limits of any effort to measure the effects of a single trial or to evaluate the effects of the whole Tribunal through one case. The approach taken by individual authors and by this book as a whole is that the *Milošević* trial can only be analyzed in its full context: not only the doctrinal framework, the evidence, the prosecutorial and defense strategies, and the judges' decisions, but also the reception of the trial, its interpretation by actors outside the legal profession, its moral and political implications, and its aesthetic aspects. Our common subject is one trial—and all that touches it.

## **A Note on How To Read This Book**

This book has many authors but is intended—and designed—to be read as a single, coherent text. This note explains how to read the book, and introduces its particular features, such as the special chronological index. It also provides a guide to the book's usage of names from the former Yugoslavia—a topic nearly as contested as the events at trial themselves.

### **Logic of the Book**

This book's approach is intensively cross-disciplinary, engaging the range of implications for law, politics, and society that modern war crimes trials create. It places the *Milošević* trial and its impact in a broad context relevant to thinkers and policy makers interested not only in this trial or the wars in Yugoslavia, but their practical lessons for other conflicts and other courts.

To this end, *The Milošević Trial—An Autopsy* brings together three distinct groups of authors: leading scholars of ICL, practitioners who worked on the case itself or at the Tribunal, and scholars or area studies specialists with expertise in the former Yugoslavia.\* A key component is the inclusion of voices from the former Yugoslavia—many authors are from the former Yugoslavia, and many others have close personal and professional ties to the region.

The book has been developed through an intensive process of collaboration among the authors, guided by close and engaged editing. As

the editor, I have exercised considerable control over the chapters on questions of internal coherence, cross-referencing, and authorial voice in the interest of producing a complete, integrated text with the qualities of a single-author work. Although each author advances his own perspective, all are engaged with a common set of questions in an agreed framework, deploying similar terminology, avoiding redundant review, and addressing a consistent set of themes.

## Organization of the Book

The book is organized into six main sections, with chapters in each section organized in pairs—a main chapter followed by a response from another author, which introduces interdisciplinary dialogue into each topic. (“Response” is a term of convenience, for each is a freestanding chapter. Some responses hew closely to the themes of the main chapter; others take the main chapter as a starting point for a separate argument.)

**Part I**, Vital Signs, provides an introduction to the trial and its context, providing a foundation and common vocabulary for the chapters that follow. Many basic facts about, or interpretations of, general events are discussed here, rather than in the chapters. **Chapter 4** in particular surveys the core events and controversies of the *Milošević* trial, which are explored in detail in the rest of the book.

**Part II**, Causes of Death, examines the course of the trial itself, from the initial decision to indict through the confrontations in the courtroom over Milošević’s self-representation, as well as the implications of the Prosecution’s strategic decision to present a unified theory of liability covering the entire Yugoslav crisis.

**Part III**, Reporting the Demise, examines popular, political, and media reaction to the trial in Bosnia, Kosovo, and Croatia—among the victim populations—as well as in the corps of international journalists covering the trial. How did these populations and communities receive and perceive the trial? What role has the trial played in their own efforts at reconciliation?

**Part IV**, Final Examination, focuses specifically on the problem of the trial’s premature termination. How are we to evaluate the *Milošević* trial—

as process, as documentary exercise, or adjudicative act—in the absence of a final verdict? Do we have a sufficient view, from the evidence and the trial process, to evaluate Milošević’s responsibility—and should we even try? Rather than simply trying to give a substitute verdict, however, the chapters in this section principally dissect claims about the uses to which the trial can or should be put.

**Part V**, *Disposing of the Body*, returns the discussion to the social and political impact of the *Milošević* trial and the Tribunal, here with a focus on Serbia. The crimes with which Milošević was charged mostly occurred in other areas, yet Serbia was his political base, and curiously, those hoping that the ICTY’s trials—not only *Milošević*, but also *Karadžić* and *Mladić*—might lead to reform and reconciliation have often assumed its greatest effects would be in Serbia. How has Serbia been affected by the trial of its long-dominant leader?

Finally, **Part VI**, *Reanimation*, considers the broader effects of the *Milošević* trial on the jurisprudence of the ICTY and on other courts, such as the International Court of Justice. These final chapters open a discussion of what the evidence amassed by the ICTY could be used for, and what the obstacles to its use are, now that the ICTY’s own demise is imminent. A coda—**Part VII**, *Biopsy*—concludes the book with a brief consideration of the trial’s legacy.

These sections are not hermetically sealed; Dominant themes in one section appear in others, and indeed the reader will find all the chapters extensively cross-referenced.

## **Aids to Following the Trial Chronologically**

The chapters of this book each address a particular issue or theme; they do not present a direct chronological account of the trial. To assist the reader with an interest in following the course of the trial, this book includes features that locate the elements of its various chapters in temporal sequence.

In addition to the standard index, a special topical index allows the reader to find sections of the book that address a given subject. This index, found at xi, notes which chapters, or parts of chapters, relate to a given

event. Thus, for example, several chapters discuss the introduction of the *Škorpijoni* video—a significant piece of evidence—and these mentions are noted together in the topical index. (Not every passing mention of an event is included in this index, only significant discussion. The regular alphabetical index includes more detailed references.)

In addition, a set of four timelines of significant events mentioned in the chapters is included at 491. These timelines include cross-references to places in the book that refer to the events. Finally, cross-references are included within the chapters themselves to alert the reader to other parts of the book that relate to the same issue. Cross-references directing the reader to another chapter generally give only the other author's last name and relevant page numbers.

## **The Nonpolitics of Language—Notes on Uniform Usage**

No effort has been made to achieve consensus among the many authors about the meaning of the trial—but every effort has been made to achieve consistency in voice and usage. Each author's argument is his own, but the common issues they engage require a common vocabulary.

Several problems present themselves in this effort. Many of the places discussed have acquired new names over time—during the period of the conflict and trial, the country ruled from Belgrade changed its borders and its name several times—and those names have often reflected differing ideological perspectives or the dominance of different groups.

This would be complicated enough, but the violence with which the *Milošević* trial was concerned was not only a juridical matter—it was, and is, deeply emotional and political. The naming of places and events is often seen as a signal, meant to assert, defend, or wound. For victims in particular, the use of an oppressor's or persecutor's language can be a painful denial of victimhood and identity. Thus the massacre in January 1999 that formed the basis for the first events for which Milošević was charged in the Kosovo conflict took place at a village known, in Serbian, as Račak—or really Рачак; the people killed there, and their relatives, however, would have called the place Rečak.



The guiding principles this book adopts are local and temporal fidelity: We use political and geographical terms corresponding with the dominant or legally recognized regime prevailing in the place at the time being discussed, not the time of writing.

Such a model presents different challenges for different parts of our subject. Whatever their other disagreements, the various parties in Bosnia, Croatia, and Serbia generally used quite similar names, differing mostly on certain orthographic conventions. But in Kosovo—Kosova—the problem is more complex. For place names there, we generally use the Serbo-Croatian name,\* with the Albanian after in parentheses. Only if a later time frame is intended—for example, reference to an opinion survey conducted in a Kosovar settlement after the 2008 declaration of independence—do we use the Albanian name first, with the Serbo-Croatian after in parentheses.

These choices will not satisfy everyone, either on political or aesthetic grounds. But no political position is indicated or implied by the use of one or the other language; the reader who is looking for politics should refer to the authors' arguments.

Indeed, some of the authors specifically criticize the ICTY's decision to rely on Serbian usages—a model similar to the one this book adopts—arguing it had regrettable effects on the course of the trial and its reception in the former Yugoslavia. Obviously, as the editor who adopted this model (and who also contributed to its adoption in the initial *Kosovo* indictment in 1999<sup>†</sup>), I do not think this danger is so serious; accusing Milošević of responsibility for a massacre at Račak—rather than Rečak—still asserts that he was responsible for a massacre.

But in any event, the issue is unavoidable—some words must be used—and the solution has been to be consistent and transparent; indeed, it is an indication of this book's dual commitment to argumentative diversity and to coherence of usage that these arguments about language are made in chapters that, nonetheless, conform to the very same common vocabulary they contest.<sup>‡</sup>

Following are some of the principles deployed in this book to ensure a common, consistent usage—the extensive list (which is only partial) itself suggests some of the fraught questions that arise merely in speaking about

the conflicts that the Tribunal undertook to adjudicate, in English, through translators.

### **Basic Usage Principles:**

- Usage is continuous throughout the book. Terms are defined or translated at the first appearance in the book, not in each chapter. If a term is of particular importance or has not been used in a while, it may be reintroduced. Terms are defined in the glossary.
- We preserve original usage in quotations and citation to texts—if a newspaper article referred to “Milosevic” without diacritics, it appears this way. The only exception is the names of cases on ICTY documents, where use of diacritics was inconsistent; we have added them.
- We otherwise rely on the usage of the ICTY—if the ICTY referred to a place by a certain name, we generally use the same.

### **References to the Former Yugoslavia:**

- We use names and abbreviations derived from local languages, with all diacritics. Although sometimes intimidating, diacritics are in fact helpful guides to pronunciation.
- Terms that have passed into common usage in English or are treated differently by convention are given in English. Thus we refer to Belgrade, not Beograd; SFRY, not the SFRJ; and the KLA, not the UÇK. Official titles that have ready equivalents in English are rendered in English: thus “President,” not “Predsednik.”
- We use “nation” to refer to an ethno-national group (narod in Serbo-Croatian), *not* a state.
- We use “Serb” and “Croat” to refer to the ethno-national group, “Serbian” and “Croatian” to refer to the political unit. We say “Serbian nationalism,” as by definition nationalism refers to the conjoining of a nation and a state.
- We generally use “Bosnia,” not “Bosnia and Herzegovina.”
- We generally use “Bosniak.” We use “Muslim” or “Bosnian Muslim” when context requires, as when referring to the group in earlier periods



in history or if a specific distinction on religious grounds recommends it.

- For wartime Bosnian government-related entities, we use “Bosnian government,” “Bosniak” or “Bosnian Muslim,” as context suggests; we use “Muslim” only if the sense absolutely recommends it, say if ethno-religious identity is at issue.
- We use “Kosovo” as an adjective for Serbs, “Kosovar” for Albanians. “Kosovar” on its own refers to Albanians, not Serbs or “members of the population of Kosovo as a whole.”
- We distinguish between federal and republican governments in Belgrade: The federal government is never “the Serbian government,” and the Serbian government is not “Yugoslavia.” We use “Belgrade” to mean “the collective governments and informal powers centered in Belgrade,” but do so consciously when there is reason (for example, to avoid excessively long lists of entities) and when there is no risk of conflating institutions with different agendas or perspectives.
- “Serbia proper” is used when discussing its autonomous provinces, or when a direct contradistinction with Greater Serbia or other Serbian territories is required.

## **References to the ICTY and the Trial:**

- “ICTY” and “Tribunal” are used interchangeably; we do not refer to the ICTY as “the Court,” which we reserve for the International Court of Justice or for municipal courts.
- Names in italics refer to a trial or trial phase. Thus “Milošević” refers to the man, “*Milošević*” to the trial. “Kosovo” refers to the province, but “*Kosovo*” refers to that phase of the trial.
- For cases with more than one accused, the names are joined with an ampersand—thus *Stanišić & Simatović*.
- The *Milošević* trial had several case numbers assigned to it. One, IT-02-54-T, was by far the most common, and when this appears on a cited document, we use the abbreviation “*Milošević* case;” otherwise, we use “*Pros. v. Milošević*,” with the specific case number appearing in the index. The case is the same.

## General Citation Principles:

- Notes with only citation information illustrative quotations, or brief parenthetical clarifications are found in the endnotes; if a note includes further substantive comment, it appears as a footnote.
- We generally avoid the common academic practice of using the names of scholars as the subject of sentences—as in “Prof. Jones argues....”—instead making the *content* of their arguments the subject. If an article is about an academic debate, participants’ names appear. Occasionally in the response chapters, other authors are referred to directly where the sense of the argument requires this.
- Unless a chapter is about the author’s own personal involvement in the trial, we have refrained from using “I” in the text. (Authors occasionally use the first person in notes, to discuss methodological issues.)

## Glossary

The acronyms used throughout this book are explained at the first use and sometimes again if particularly important or if they have not been used in a long while. However, they are not explained in each chapter. This glossary provides the full version of acronyms and, where needed, their English translations

Acronym	Full Version	English Translation
ARBiH	<i>Armija Republike Bosne i Hercegovine</i>	Army of the Republic of Bosnia and Herzegovina
BiH	<i>Bosna i Hercegovina</i>	Bosnia and Herzegovina
DS	<i>Demokratska stranka</i>	Democratic Party
DOS	<i>Demokratska opozicija Srbije</i>	Democratic Opposition of Serbia
DSS	<i>Demokratska stranka Srbije</i>	Democratic Party of Serbia
ECCC	Extraordinary Chambers in the Courts of Cambodia	—
FRY	Federal Republic of Yugoslavia	—
GSS	<i>Građanski savez Srbije</i>	Civic Alliance of Serbia
HDZ	<i>Hrvatska demokratska</i>	Croatian Democratic

	<i>zajednica</i>	Union
HV	<i>Hrvatska vojska</i>	Croatian Army
HVO	<i>Hrvatsko vijeće obrane</i>	Croatian Defense Council
ICC	International Criminal Court	—
ICJ	International Court of Justice	—
ICL	International Criminal Law	—
ICTR	International Criminal Tribunal for Rwanda	—
ICTY	International Criminal Tribunal for the Former Yugoslavia	—
JCE	Joint criminal enterprise	—
JNA	<i>Jugoslovenska narodna armija</i>	Yugoslav Peoples' Army
JSO	<i>Jedinica za specijalne operacije</i>	Special Operations Unit
KLA	<i>Ushtria Çlirimtare e Kosovës</i>	Kosova Liberation Army (see UÇK)
KOS	<i>Kontraobaveštajna služba</i>	(Military) Counterintelligence Service
KVM	Kosovo Verification Mission	—
LDK	<i>Lidhja Demokratike e Kosovës</i>	Democratic League of Kosova
LCY	<i>Savez komunista Jugoslavije</i>	League of Communists of Yugoslavia
MOS	[refers to <i>Pros. v. Milutinović</i> et al.]	—
MUP	<i>Ministarstvo unutrašnjih poslova</i>	Ministry of Internal Affairs

NATO	North Atlantic Treaty Organization	—
NLA	<i>Ushtria Çlirimtare Kombëtare</i>	National Liberation Army (see UÇK)
OHR	Office of the High Representative	—
OSCE	Organization for Security and Cooperation in Europe	—
OTP	Office of the Prosecution	—
RECOM	Regional Commission for Establishing the Facts about War Crimes and Other Serious Violations of Human Rights Committed on the Territory of the Former Yugoslavia in the Period from 1991–2001	—
RS	<i>Republika Srpska</i>	Serbian Republic (often rendered ‘Republic of Srpska’ or <i>Republika Srpska</i> in English) NB does not refer to the Republic of Serbia, the Yugoslav republic and later independent state governed from Belgrade
RSK	<i>Republika Srpska Krajina</i>	Serbian Republic of the Krajina
SAO	<i>Srpska autonomna oblast</i>	Serbian Autonomous Oblast
SCSL	Special Court for Sierra Leone	—
SDA	<i>Stranka demokratske akcije</i>	Democratic Action Party

SDB	<i>Služba državne bezbednosti</i>	State Security Service
SDG	<i>Srpska dobrovoljačka garda</i>	Serbian Volunteer Guard (also known as the Tigers)
SFRY	Socialist Federal Republic of — Yugoslavia	
SRS	<i>Srpska radikalna stranka</i>	Serbian Radical Party
STL	Special Tribunal for Lebanon —	
SPS	<i>Socialistička partija Srbije</i>	Socialist Party of Serbia
SVK	<i>Srpska Vojska Krajine</i>	Serbian Army of the Krajina
TO	<i>Teritorijalna odbrana</i>	Territorial Defense
UÇK	<i>Ushtria Çlirimtare e Kosovës</i>	Kosova Liberation Army (see KLA) NB: In Albanian, the UÇK also identifies the National Liberation Army (see NLA)
UNDU	United Nations Detention Unit	—
VJ	<i>Vojska Jugoslavije</i>	Army of Yugoslavia
VRS	<i>Vojska Republike Srpske</i>	Army of Republika Srpska (see RS)
VSO	<i>Vrhnovi savet odbrane</i>	Supreme Defense Council

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# PART ONE

## Vital Signs

### THE *MILOŠEVIĆ* TRIAL AND ITS

### CONTEXT—A FOUNDATIONAL PRIMER

This Primer is organized in four chapters: conflict, Tribunal, suspect, and trial. The purpose is to provide a foundation to the reader for the chapters that follow: to devise a common vocabulary, and to locate the individual chapters in a broader context. This means that many basic facts about or interpretations of general events are discussed here, rather than in the chapters.\* The chapters themselves assume considerable knowledge about Yugoslavia and the ICTY, the basic outlines of which are laid out here. This Primer therefore raises some of the same issues that the chapters discuss, but no attempt has been made to represent the views of the authors of the individual chapters or to bring the arguments and observations made here into alignment with theirs. No single view is intended, as no single view encompasses the diversity of perspectives expressed by the many authors in this book. Indeed one of this Primer's purposes is to indicate where there is diversity of opinion on a given question, as well as what that diversity means for views about the *Milošević* trial, the Tribunal, and their relationship to the broader project of ICL.† At the same, time, these introductory chapters express, or imply, some views of their own—of their author‡—and it could not be otherwise.

# 1

## The Context, Contested

### Histories of Yugoslavia and Its Violent Dissolution

PRESIDING JUDGE [MCDONALD]: Is it possible for you...to tell us, starting from the beginning and taking us to the end, the changes in terms of the ethnic composition in different areas, but beginning from the fourteenth century?....

DR. JAMES GOW: Overall I think the purpose of the evidence is to set the events of 1991 and afterwards in their military-political context. In order to do that I have been reviewing some of the factors which went to create the Yugoslav states ... and that has meant making reference not only to the fourteenth century but to the fourth century ... to give a sense of the way in which the territories which went to make up the federation which dissolved came to be.\*

There is little about the history of Yugoslavia, its dissolution, or the violence that followed that is uncontested, and the prospects of saying something both meaningful and uncontroversial are vanishingly small. But there is still much to say, and if we consider that history in light of the *Milošević* trial, we may approach those debates from a new and consequential perspective. Of course, the ICTY was not formally concerned with the collapse of Yugoslavia, or even with the war as such, only its atrocities; still, all that preceded the war, and contributed to it, came into question, becoming part of debates about how those atrocities

should be interpreted and judged, and about what the purposes of judging were, or should be.

In the *Milošević* trial, both the Prosecution and the Accused spent considerable time and resources debating matters of history—matters that occurred before the Tribunal’s temporal mandate, sometimes long before. Indeed, for certain charges, such as genocide, historical context was an essential element of the Prosecution’s case—even more than in other cases, historical claims bore causal weight in the argument, or were supposed to—whereas Milošević openly framed his defense in political and historical terms. For some, these discussions were essential to a full and meaningful accounting of Milošević’s role in context, or as a way of asserting—or defending against—claims of collective responsibility. For others, these historical excursions were a distraction from the proper forensic purpose of a trial.

Perhaps the trial should have dealt with history, perhaps not. Expressing the relationship of Yugoslavia’s history, or of its successors’ contemporary societies and politics, to the Tribunal and the *Milošević* trial is a fraught enterprise—any selection of facts, events, and interpretations inevitably implies, or will be read to imply, a particular view of the trial, and of the trial’s relationship to the regulation of violence, the telling of judicial narratives, and the assignment of legal or moral responsibility. Each reader will have to decide for himself what, exactly, the relationship of historical events to the trial and its legacy is, or ought to be. But this is precisely the point: Because we are concerned with a trial in which history either mattered or was thought to matter, we must consider that history to understand the trial.\*

## **I. To the Founding of Yugoslavia**

### **A. Formation of social and political communities**

The region that in the last century came to encompass Yugoslavia is now known, sometimes, as the Western Balkans, though that name itself is of recent and migratory provenance.<sup>†</sup> Much of the area is mountainous, a factor that, it has been argued, has contributed to the historical character

of the region's social and political structure as a marginal hinterland of empire.<sup>1</sup>

The populations living in the region during the wars with which we are concerned descend, or say they descend, from communities that have lived in the region for a very long time, and we must be cognizant of parallel if not fully compatible claims about their nature and origins. Nationalist perspectives naturally view the identities of the ethno-national communities discernible today as primordial or at least extremely ancient; the overwhelmingly dominant scholarly perspective points, instead, to those communities' historicity and the relatively recent formation of specific, and specifically national, identities.<sup>2</sup>

Slavic-speaking populations arrived in the region from the 6th century and constituted, in short order, a lasting majority in the Western Balkans. But although groupings identified by terms such as "Croat" or "Serb" date from this era, the formation of specific national identities among these Slavs was, on the most commonly accepted academic account, a process that occurred much later. Groups identifiable as Slovenes, Croats, Serbs, Montenegrins, Bosniaks or Bosnian Muslims, and Macedonians—not merely as eponymous denizens of a given area, but as members of an ethno-national community—appear centuries later, with some of these groups only coalescing as specifically national communities in the 20th century.<sup>3</sup>

Speakers of South Slavic languages have long constituted a majority in the Western Balkans as a whole, though not in all its parts. Today's Albanians—speaking a separate, non-Slavic language—commonly claim that their linguistic forebears were in the region before the Slavic migration, identifying themselves with the Illyrians and Dardanians; the full extent of that identity has not been confirmed, but it is unclear where else Albanian-speakers might have come from.<sup>4</sup> Albanians have long been present in the southern areas of what became Yugoslavia, and during the 20th century formed an ever larger majority of the population in the area known as Kosovo—a process, the memory of which itself formed the basis for contestation and recrimination; by the time Yugoslavia collapsed, Albanians were an overwhelming majority throughout Kosovo and western Macedonia.\* Other ethnic and linguistic communities have played significant roles in the region—Hungarians, for example, or Turks and



Germans, whose ethno-lingual antecedents generally arrived in the region somewhat later, with the ascendancy of the two great modern empires, that dominated the region after the 1500s.<sup>5</sup>

Independent kingdoms bearing the names Bosnia, Croatia, and Serbia appear at various points in the Middle Ages.<sup>6</sup> Each of these kingdoms disappeared or was entirely absorbed into imperial political circuits. For several centuries, the region was dominated by the Ottoman Empire in the south and later the Austrian Habsburg monarchy in the north. A relatively stable frontier between the two empires formed with the Treaties of Karlowitz in 1699 and Passarowitz in 1718, with the areas that came to form Vojvodina, Croatia, and Slovenia under the Habsburgs, and Bosnia, Serbia, Kosovo, and Macedonia under the Ottomans, who also exercised suzerainty over areas of Montenegro, which long maintained a kind of frontier independence.<sup>7</sup>

It is hardly clear that the medieval kingdoms constitute direct lineal antecedents of the current political units bearing those names, though nationalists see it that way.<sup>†</sup> Croatian nationalists assert a particular historical and legal continuity based on the existence of certain autonomies and governance privileges,<sup>8</sup> but even these relatively attenuated claims are absent for the Serbian and Bosnian state projects.<sup>‡</sup> The autocephalous Serbian Orthodox Church retained, during much of this period, a separate ecclesiastical identity and had considerable autonomy under the Ottomans, and in some sense served as a carrier for Serbian political identity, or was seen to in retrospect,<sup>9</sup> but a similar specific religious repository for a differentiated political identity was not available to Catholics or the Muslim community that developed under the Ottomans. Other units—Slovenia, Kosovo, Macedonia—cannot plausibly point to any recognizable independence prior to the 20th century, and consequently base their national legitimacy primarily on other grounds.

Two developments that arguably matter for the more recent history of the region appear around the early 19th century. Beginning, perhaps, with the Napoleonic caesura and the introduction of revolutionary radicalism in Illyria, ideas of pan-Slavic unification surface in the politics of the region—or a more specific South Slavic unification, from which the term “Yugoslavism” derives—a development that drew support from diverse parts of the Slavic-speaking Balkans, and that was consistent with, indeed

part of, the broader nationalist trends observable throughout Europe in the 19th century.<sup>10</sup>

Alongside this, distinct political units whose base of power and self-image was linked to specific ethno-national communities also appear (or become more apparent). An autonomous Serbia formed between 1804 and 1815, still nominally under the Ottomans but effectively independent, and formally, fully so from 1878, the same year Montenegro's already extensive autonomy was crystalized and confirmed in the Treaties of San Stefano and Berlin.<sup>11</sup> The Kingdom of Croatia had long retained a formal, and sometimes substantial political autonomy within the Habsburg Hungarian crown, and secured, after the *Nagodba* of 1868, a highly autonomous administration.\* These units were not uncomplicatedly national in nature—they contained large populations that were religiously or linguistically distinct—but over time their identification with a particular nation became more reified; this too was consistent with, and part of, the arc of 19th-century national and state formation. These processes, especially 19th-century strategic discussions about an expanded Serbian state in a document known as the *Načertanije*, were invoked by the *Milošević* Prosecution to contextualize its claims about the meaning of Greater Serbia for the charges against Milošević.<sup>12</sup>

By the late 19th century, what had been the frontier between two great empires now was a fracture zone with several independent or quasi-independent states (including Greece, Romania, and Bulgaria).<sup>13</sup> By the early 20th century, these states had become much stronger and ambitious; in the Balkan Wars of 1912 and 1913, combinations of them pushed the Ottomans almost entirely out of the region, then fell to fighting among themselves; as a result, Serbia and Montenegro greatly expanded their territory, encompassing what became Macedonia and Kosovo. Austria-Hungary still ruled Bosnia and everything north of the Sava, but the First World War swept away Habsburg power as well: At the end of that war, Serbia emerged as the dominant power in the region, and its political and military elites acceded to most of the territory with which we are concerned, in the form of what is commonly called the First or Royal Yugoslavia.

This was the moment Yugoslavia first came into existence, and in that moment, both the conditions for its creation and the contradictions it

would have to contain might have been discerned: a desire, shared by many, for political union, but also the existence of established separate national identities of the kind that, elsewhere in Europe, were forming—or already had formed—their own states. With these dual forces came the interpretative challenge that—in hindsight—seems so unavoidable, and that later implicitly animated much discussion at the Tribunal about the responsibility for Yugoslavia’s violent collapse: Was this a possible or impossible state?<sup>14</sup>

## **B. Claims about community—Cleavages and their significance**

Various candidates for persistent political, social, and economic cleavages have been identified on the territory of Yugoslavia—a north–south division, for example, as well as Catholic–Orthodox, Christian–Muslim, Habsburg–Ottoman, Slav and non-Slav.<sup>15</sup> Some of these differences are undeniably observable—economic imbalances between wealthier Slovenia, Slavonia, and Vojvodina, on the one hand, and poorer Kosovo, Macedonia, and Bosnia, on the other, long predate the Yugoslav period.<sup>16</sup> But these are merely factual observations; their meaning, of course, is what matters and is contested. These cleavages have acquired even greater salience and poignance in retrospect, as possible explanations for what happened in the 1990s. But they are not only read backward; many of them were posited long before those violent events.<sup>17</sup>

***Religious identity:*** One of the cleavages readily observable—if contested in its meaning or relevance—is religious identity. The north and west of the former Yugoslavia is heavily Catholic; the east and south are Orthodox, and there are large communities of Muslims in the center and south. These historic patterns are readily visible in the architecture of the region—anyone visiting the former Yugoslavia will be immediately struck by the differences in traditional architecture between *mitteleuropäisches* north and Oriental south—and were to an even greater extent prior to the wars.

To say that these patterns were visible is not to say they were determinative. Although individual practice always varies tremendously, in general the populations of the Western Balkans have not been known for scrupulous orthopraxy, and this has been true of all the major religious



traditions.<sup>18</sup> The traditional religious tolerance or syncretism of areas such as Bosnia is legendary, and indeed the legend of it has played a powerful role in organizing conceptions of the conflict and external interventions in Bosnia in the postwar era.<sup>19</sup>

At the same time, although the populations of the region were not always particularly religious in that sense, it is also, and perhaps tragically, true that religious identity was closely aligned with national identity, a process that was reinforced by the Ottoman millet system, in which religious communities were given significant authority to govern their own affairs. Serbs, Montenegrins, and Macedonians are overwhelmingly Orthodox, Croats and Slovenes Catholic, and Bosniaks Sunni Muslim; Kosovar Albanians are predominantly Muslim, though with smaller Catholic populations. Indeed, the very delineation of national identities such as Serb and Croat was essentially a function of religious identification.<sup>20</sup> Although a relatively recent phenomenon, this identification was such that, by the time the Yugoslav state formed, even the idea of an Orthodox Croat or Catholic Serb—though such beings have existed in the past and elsewhere—was almost inconceivable. (The idea of a Muslim Serb or Croat persisted for some time longer, but in a sense this only made the national question more, not less difficult. \*) Of course, in cross-generational perspective, religious identities were being traded out all the time through marriage, but by the late modern era the result was relatively stable populations and very little defection within any generation.<sup>21</sup> And, indeed, the very fact that religious identity did not impose onerous burdens of devotion may have served to reinforce its function as a maker for national identity; relaxed religious practice does not imply irrelevance.

**Language:**<sup>22</sup> Of all the cleavages that have been proposed to explain or justify conflict in the former Yugoslavia, language is perhaps the most problematic. In some cases, language differences correspond crisply with sociopolitical divisions, as between Kosovar Albanians and Slavs, or between Croats and Slovenes. But in many instances—especially within the broad belt of Slavic speakers in the middle of what became Yugoslavia—there is, historically, little correlation between language and other markers of identity. Croats, Serbs, and Bosniaks have long spoken (and even now still speak) a mutually intelligible language, with variations in



usage and pronunciation that cut across ethnic markers—dialects were regionally marked, and did not correspond with religious, ethnic, or political divisions. Orthography has described a partial difference between Serbs and Croats—Croatian is never written in Cyrillic, while Serbian normally is—but even this division was hardly ironclad, as many Serbs routinely use *latinica*. But this does not mean language was not, or could not be, divisive: On the contrary, language politics were often fraught in the Yugoslav era; indeed, the very thinness of the differences between the variants of Serbo-Croatian (as it was most commonly called in English) simply served to make the symbolic differences all the more contestable.<sup>23</sup>

And, if one imagines the intersection of religious identity and language, then discernible cleavages appear that track with the ethno-national division of the populations: Both Slovenes and Croats are predominantly Catholic, but speak distinct Slavic languages; Croats, Serbs, and Bosniaks largely share a language, but are Catholic, Orthodox, and Muslim respectively, and so on. The communities for which even the dyad of language and religion do not satisfactorily serve to define perceived divisions are, not coincidentally, the same communities that have been or are generally thought to have less than fully separate identities: Many Montenegrins have traditionally felt closely aligned to and identified with Serbs, with whom they share both language and religion. Similarly, a crisp distinction between ethnic Macedonians and their Serb (or Bulgarian) neighbors has been a relatively late phenomenon, reflected in the relatively recent establishment of a separate Macedonian Orthodox Church and the relatively late differentiation of Macedonian as a literary language.

**Significance:** Whatever their origins, most of these social cleavages—and the self-identified ethnic, national, or religious communities related to them—were in place prior to the creation of the first Yugoslav state. Large groups consciously identified themselves as Serbs, Croats, or Slovenes; others had different identities—Muslim, Orthodox—or, of course, identities based on economic status or relationship to feudal and dynastic categories, but even these, over the course of the 20th century, moved in the direction of more clearly delineated national identities. The question, of course, is whether these differences mattered in a political sense—

whether they made the project of a common Yugoslav state more or less plausible.

Intercommunal relations among these groups have varied considerably over time, and indeed the effort to characterize those relations as either peaceful or fraught has itself become inextricably caught up in contestation about the nature—inevitable or contingent, organic or engineered—of the recent conflicts. Although nationalist historians and some Western journalists have painted the region as one of immemorial national struggle,<sup>24</sup> there exists broad consensus that the communities in the region generally lived in peace—at least, “[f]or centuries...life in the Balkans was no more violent than elsewhere[.]”<sup>25</sup> Moreover, to the degree one recognizes the ethnic aspect of the dissolution in the 1990s, as one must, this presents a problem for historicizing interpretations, as “it is difficult to find examples of sustained interethnic conflict before the modern period.”<sup>26</sup> Indeed, for long periods of their history, these communities would not necessarily even have conceived of their linguistic or ethnic differences as meaningful frameworks for politics—that is, the populations were not mass nations in the modern sense, and it is anachronistic to read such identities back onto their behavior.<sup>27</sup>

Equally, though, claims that the peoples of what became Yugoslavia coexisted in some peaceful, tolerant, harmonious, and multicultural past exhibit their own anachronism or fantasist desire to project an interpretation backward. Much of the region’s social and political organization exhibited qualities related to differences of ethnicity, language, and religion,<sup>\*</sup> and these became more salient once they were mapped onto projects of nationalism, as from the 19th century they increasingly were. And there had been violence, though nothing like what was soon to come.<sup>†</sup>

We may also discern relative differences in the interactions of communities that later, in the 1990s, divided with such bitterness. For example, plausible claims are made that Bosnian society was notable for its tolerance and syncretism<sup>28‡</sup>—though its very notability implies the neighbors were less tolerant, just as it suggests that Bosnians themselves were aware of differences among themselves. On the opposite end of the spectrum, Serbs and Albanians have historically been more distant than ethnic groups in other parts of the former Yugoslavia.<sup>29</sup> There is no reason

to believe this enmity is an immanent condition, but it has been remarked upon at least for a century or more; certainly, by the time the events with which the Tribunal is concerned were set in motion, relations were extremely hostile, and no one could remember a time when that was not at least partly true.<sup>30§</sup>

The seemingly irreconcilable nationalist projects that, much later, either contributed to or were a symptom of the country's collapse, were therefore present at the creation. Yet so too were the aspirations and the integrative incentives expressed in the Yugoslav idea—after all, if the country were truly impossible, how did it form in the first place? We turn now to the events and processes that developed across the seven decades of the Yugoslav social and political experiment—the events and processes with which the *Milošević* trial was most concerned—until the country's final, definitive destruction.

## II. The Yugoslav State

### A. Royal Yugoslavia<sup>31</sup>

The actual original name of the new state founded after the First World War—the Kingdom of Serbs, Croats, and Slovenes, for the three recognized or constituent nations that constituted the state—suggests some of the cleavages that, in retrospect at least, marked the project as unstable. Other communities that would, during the second Yugoslavia, come to be recognized as nations—Montenegrins, Macedonians, Bosnian Muslims—were not recognized in the ethno-political constellation of the kingdom. In addition, the new state was a pastiche of recently defunct and continuing legal and political traditions—Serbian, Montenegrin, Ottoman, Habsburg.

The politics of the kingdom were marked by considerable instability and fractiousness, involving recurrent variants of a power struggle between centralizing Serbs and federalist or autonomist Croats, with Slovenes in a kind of intermediating, balancing role. Party politics was highly ethnicized, although parties of different ethnicity regularly cooperated in forming governments.<sup>32</sup> By the late 1920s, the resulting paralysis created an opening for a royal dictatorship: the country, renamed



Yugoslavia, was reorganized into political units mostly named for rivers, in a bid to avoid ethnic identification. This plan in turn came under pressure from Croats who demanded and received the creation of an autonomous Croatian unit, the *Banovina Hrvatska* within Yugoslavia, in the agreement known as the *Sporazum*.<sup>33</sup> This element of ethno-national political contestation within Royal Yugoslavia has been of direct relevance in trials at the ICTY, seen as a precursor or model for efforts to unify areas of Bosnia with Croatia.<sup>34</sup>

The ultimate viability of the first Yugoslavia is a speculative matter, because its efforts to achieve a stable equilibrium under Regent Paul were cut short by the Second World War. In April 1941, Germany and its allies invaded and occupied Yugoslavia, whose territory was divided into a welter of jurisdictions: a notionally independent Croatia, including most of today's Croatia and Bosnia, and pieces accorded to Hungary, Bulgaria, Italian Albania (which absorbed Kosovo), and Italy itself, as well as areas under direct or indirect German administration, principally in Serbia proper.<sup>35</sup>

The Second World War itself is often thought to be consequential to the later dissolution of the second Yugoslavia in the 1990s. Two major movements arose in response to the occupation and division of the country: the Partisans, Communist in orientation and led by Josip Broz Tito, and the Chetniks, predominantly Serb Royalists. Under cover of resistance to German and Italian occupation, the two groups frequently fought each other in a conflict taking the character of a civil war.<sup>36</sup> The scale of violence of these years was extraordinary, far outstripping the horrors of the 1990s; standard estimates place the death toll at over one million, with the majority of killings attributed to other Yugoslavs, rather than the occupying forces.<sup>37</sup>

The cataclysmic violence of the Second World War had undeniable ethno-national aspects—the killings of Serbs, Gypsies, Jews, and others at the Jasenovac concentration camp were an expression of the fascist Croat state's *raison d'être*, for example<sup>38</sup>—but entered into postwar mythology as a pan-Yugoslav ideological liberation struggle. The role of the liberator was played by the Partisans, but those against whom the liberators had most often actually struggled were, of necessity, somewhat ambiguously defined—Nazis of course, and Chetniks, but not as visibly the many, many

Yugoslavs who had taken no part in the popular liberation but had instead acquiesced or actively taken part in other political projects during the war.\* Although this mythologizing policy was intended to reduce postwar tensions, for some observers its sublimation or suppression of memory contributed to the conflagration of the 1990s, or channeled its violence along particular paths.<sup>39†</sup>

## B. Socialist Yugoslavia

The victors in the civil struggle during the Second World War were Tito's Communist Partisans, and the state that was declared during the war and consolidated at its end has come to be known as the Second Yugoslavia, also called Socialist or Titoist Yugoslavia. Its formal name went through several changes, but eventually settled as the *Socijalistička federativna republika Jugoslavija* (Socialist Federal Republic of Yugoslavia, or SFRY). Its ideological slogan was *bratstvo i jedinstvo* (Brotherhood and Unity)—an aspiration that suggests both an intention to overcome the national divisions that plagued the first Yugoslavia and their very real continuity.<sup>40</sup>

**Sources of Stability:** Those inclined to see Yugoslavia as an impossible country must account for its survival over 45 years—certainly, there were considerable bases for stability within the SFRY.<sup>41</sup> In its earliest years, the new rulers resorted to repression, terror, and violence, imprisoning opponents and waging campaigns of suppression against remnant rivals for power and the restive Albanian population in Kosovo, for example. But after the first years—and certainly after the fall of Tito's internal security chief Aleksandar Ranković in 1966—such direct and violent repression was rarely practiced; political repression continued, as during the suppression of liberal and national elements in Croatia, Slovenia, and Serbia in the early 1970s, but the authority and respect accorded the regime also drew on other sources.<sup>42</sup>

Following the break with Stalin's Soviet Union in 1948, Yugoslavia charted an independent course as a nonaligned Communist country. This interstitial position gave the country considerable diplomatic leverage, from which flowed influence and, inconsistently, Western funding.<sup>43</sup> The break with Stalin and the demographics of Yugoslavia also gave rise to a system of decentralized economic governance, known as socialist self-

management, which represented a considerable innovation within Communist practice and became, arguably, a source of prosperity and stability for several decades.<sup>44</sup> From the 1960s on, however, prosperity was increasingly financed by those foreign loans, as well as by remittances from the large number of Yugoslavs working in Western Europe.<sup>45</sup>

The basic structure of the Yugoslav political system was also, arguably, a source of stability during much of the Cold War. Yugoslavia was a federal state, with six republics and, within Serbia, two autonomous provinces, each represented in the federal legislative and executive organs. Initially, real power was highly centralized, but in the *Savez komunista Jugoslavije* (League of Communists of Yugoslavia or LCY) rather than state organs. Over time, and especially after the early 1960s, these state units received progressively more power from the center, so that by the promulgation of the 1974 Constitution, they were in fact highly autonomous.<sup>46</sup> The progressive decentralization of the country—with ever more authority over political, economic, and social policy pushed down to the level of republics and provinces, to enterprises, and to the parties at republican and provincial levels—itself provided a measure of alleviation for those who might otherwise have been discomfited by the kind of centralized authority that marked much of the first, Serb-dominated Royal Yugoslavia.

The SFRY's decentralized system ensured representation and protection for each unit—and through them, implicitly, for the national communities. The republics and provinces provided a secure administrative and political haven for members of titular nations—Slovenia for Slovenes, say, or Macedonia for Macedonians—and the two largest nationalities, the Albanians and Hungarians, in the two Serbian provinces. The rights and interests of members of nations (*narodi*) living outside their titular republic and of nationalities (*narodnosti*) were safeguarded against republican or national encroachment by the overarching federal institutions and the Party, as protectors of the coexistence principle. National identity was protected—one was free to identify as a Serb, Croat, or other recognized category on—and even encouraged—Macedonians and Bosnian Muslims were first recognized as nations under the SFRY—though also cabined within cultural and nonpolitical limits.<sup>47</sup>



The LCY served as an agent of control and mediation among these units, and of course Tito himself acted as arbiter. Tito possessed immense authority and prestige, and as the years passed acquired an almost supra-political status, allowing him to mediate disputes and guide the general direction of the country.<sup>48</sup> During his lifetime, Tito exercised formal and factual authority, and under the last, 1974 Constitution, was identified as president for life. More generally, the Partisan legacy supplied a justificatory mythology for the state, as well as a cadre of ideologically aligned individuals to govern.

***Sources of Instability:*** The Partisan legacy, the unique status of the SFRY in geopolitics, and the pervasive decentralization of the country's economy and politics therefore had a stabilizing influence. Yet certain of these same factors appear, equally, to have served as destabilizing influences in the late Cold War environment: "The country's complex system of shared sovereignties among levels of government and extensive economic democracy thus produced both centripetal and centrifugal tendencies."<sup>49</sup> That is to say, Yugoslavia did not collapse despite these factors, but in part because of them.

The 1974 Constitution had radically decentralized the state, pushing large elements of governance to the republics and provinces. The state retained some functions—including, critically, the *Jugoslovenska narodna armija* (Yugoslav People's Army or JNA)—but even in security matters the republics and provinces took on a larger role through the system of *teritorijalna odbrana* (Territorial Defense or TO). The LCY itself decentralized power to the republican and provincial parties within an umbrella organization; those local parties increasingly identified with their own local governance structures, patronage networks, and economic priorities. Increasingly, republics and provinces were competing with each other—and their elites competed as republican and provincial elites, rather than as branches of an all-Yugoslav Communist party—and viewed control from Belgrade as a threat. These same disaggregated networks produced redundant and inefficient economies that were heavily reliant on debt financing and vulnerable to external economic shocks.

Thus the decentralization that had, in much of the postwar era, served to mitigate potential conflict itself became a source of instability, especially once efforts were undertaken to reassert central control. And, of course, although decentralization may have provided stability, the impulse

to decentralize itself suggested something else: the subunits that were given power were proxies for separate national identities, some of which not long before had openly contested the sovereignty of a centralized state in the Western Balkans. Decentralization had been a response to an endemic challenge to the unity of Yugoslavia.

Finally, the Partisan legacy constituted a source of legitimacy that was, almost necessarily, bound to run out. Tito had begun his rule at the end of the Second World War as a middle-aged man, but by the 1970s he had withdrawn from active governance to attend to international affairs and personal ones. His authority was largely unquestioned but also—the worse for the country’s future—unquestionable. No successor of similar stature was available, and no one person could plausibly take his place—the key being, perhaps, that no *one* person could, and that thereafter governance, if it was to succeed, would have to be collective and cooperative. Whether Tito himself really was an essential source of support for the Yugoslav state, his death in 1980 provoked considerable anxiety about the future of the country—anxiety which itself indicates that the stability of the country was far from given even then.<sup>50</sup>

The Partisan generation itself was, by this time, thinning out, and younger, rising cadres—which included Milošević—did not have the same connections and understandings.<sup>51</sup> They had grown up, not with Tito, but in his shadow, and in the decentralized society his system had devised, which, over time, directed their loyalties and their attention to the units of decentralization—the republics and provinces—and implicitly to the communities those units represented.

In certain respects, Communist Yugoslavia was a highly mutable political system, constantly revising and reinventing itself, progressively altering the terms of political trade between its layers and units. This can be read, of course, as a healthy and responsive dynamism, or a kind of quietly desperate improvisation, a means of waving off underlying and unresolved tensions. And, at the same time, we may observe certain features that did not change—the dominant role of the Communist party and with it the marginalization of openly nationalist politics—which suggests rigidity at the very points that, in the event and at the end, mattered most.<sup>52</sup> For when the crisis came—either by happenstance or with tragic inevitability—it came through the triple challenges of



economic distress, the collapse of Party authority, and the rise of nationalist alternatives; the Yugoslav state and society were not able to muster the flexibility to change further and survive.

### III. Crisis and Dissolution

The *Milošević* Prosecution chose to begin its account of Yugoslav history with the 1974 Constitution<sup>53</sup>—a plausible enough point (assuming one believes a trial should deal with history at all), as it was then that the system destroyed in the early 1990s was established. Which is to say, from that moment it became evident to observers that, once Tito died, the Yugoslav system would enter a period of changed and uncertain governance.

The particular form that governance took was a collective presidency, representing all of the federal units of the SFRY: the six republics, two autonomous provinces of Serbia, and the president of the LCY.<sup>54</sup> Such an institution requires a considerable degree of cooperation to function. Decentralization had made cooperation far more difficult and far less attractive—much real power was now vested in the republics and provinces, and the federal government's coordinating role was considerably attenuated. Tensions soon surfaced in ways that converted the stabilizers of the SFRY into drivers of crisis and dissolution, once the broader political and economic conditions in which the country existed changed.

Yugoslavia's position as a communist country outside the Soviet orbit, which had afforded it so much traction with the West during the Cold War, became strategically less interesting with the decline in East–West tensions in the late 1980s. One consequence was that the economic model underpinning Yugoslavs' living standards became increasingly difficult to finance. The loans that had floated the Yugoslav economy since the 1960s had piled up a burdensome foreign debt and given Western lending institutions, such as the International Monetary Fund or IMF, considerable leverage over questions of reform; when the IMF adopted a strategy of structural adjustment in the 1980s, it began to impose reform conditions on Yugoslavia that accelerated the political crisis.<sup>55</sup> The economic crisis

worsened considerably, with hyperinflation and difficulties in financing the country's debt.<sup>56</sup> Reforms that proposed recentralization of power not only challenged the autonomy and powers of the federal units as such, but also of the communities they represented. Thus, for example, the IMF's demand for recentralization of economic and fiscal decision making—and proposals by Milošević himself, seen by the late 1980s as an economic reformer<sup>57</sup>—met with considerable resistance from wealthy and autonomous republics such as Croatia and Slovenia. Recentralization to the federal center became conflated with the other risks that, traditionally and logically, were associated with the center in Yugoslavia: dominance by Serbia.

Decentralization had also exacerbated ethnic and national tensions in a more direct fashion. With the 1974 Constitution, Kosovo had become an effectively fully autonomous federal unit—still a province within Serbia, but almost entirely self-governing with its own federal representation. The ethnic Albanian majority increasingly took over governance from the Serbs who had, in much of the postwar era, dominated the province.<sup>58</sup> This change—against the historical backdrop of tense intercommunal relations, including the intergenerational memory of alternating periods of domination during the 20th century—was discomfiting to local Serbs, some of whom began to voice their grievances in nationalist terms that were also gaining increasing currency with Serb elites in Serbia proper.<sup>59</sup> Kosovar Albanians had themselves become more radical, with calls for republican status appearing during protests in 1981 that were violently suppressed.<sup>60</sup> It had long been politically taboo to advance nationalist political projects—the policy of *bratstvo i jedinstvo* also implied sanctions for those who questioned the limits on national expression—but there were vocabularies in which such sentiments could be indirectly expressed; one form was to caution against another community's dangerous nationalism in a defensive appeal. In the early post-Tito years, this convention still held, but was increasingly weakening, opening space for direct, vocal assertion of nationalist interests, both from outside the regime and within it.\*

In 1986, a draft report by the Serbian Academy of Arts and Sciences that itself expressed this new opening and further catalyzed it, was leaked to the media—whether intentionally or accidentally it is not clear. The

SANU Memorandum, as it is known, painted a grave—from some perspectives hysterical—picture of repression of Kosovo’s Serb minority, and referred to the processes by which Albanians were taking control of the province as a “physical, political, legal and cultural genocide of the Serbian populations[.]”<sup>61</sup> The release of the Memorandum was a shock to the increasingly threadbare conventions and complacency of post-Titoist society. It was roundly condemned by the Communist hierarchy—a leadership that now included Slobodan Milošević, the recently appointed head of the Serbian Communist Party.<sup>†</sup> It was also, of course, a concrete cause for concern in the other republics, now in economic duress and under pressure to repatriate power to Belgrade—to the center.

Milošević began to court nationalists, while maintaining strong credentials with the traditional Communist elites and with reformers. The ascent of Milošević and Serbian nationalism brought with it the political subordination of the two federal provinces within Serbia. In the so-called anti-bureaucratic revolutions, orchestrated by Belgrade, the provincial administrations in Vojvodina and Kosovo were replaced and coerced into surrendering their autonomy back to Serbia. Milošević asserted indirect control over Montenegro through similar means. In Kosovo, the suppression of provincial autonomy was expressly coercive, with military forces surrounding the provincial Parliament as it voted to abrogate its own autonomy.<sup>62</sup> Albanian opposition, led by Ibrahim Rugova, adopted a strategy of pacifist rejectionism, holding an unofficial referendum to confirm the independence of Kosovo and developing a system of parallel institutions.<sup>63</sup>

The subordination of Vojvodina, Kosovo, and Montenegro had destabilizing consequences for the federal structure of the SFRY: The two provinces’ autonomy within Serbia was destroyed, but their position in the federal system was preserved, meaning that Milošević captured their seats on the presidency and in Parliament. Through them, together with his effective control of Montenegro, exercised through Momir Bulatović, Milošević had fully half the seats on the presidency. This presented a serious danger to the other republics’ interests and made any further federal recentralization—even of the most technical kind—difficult to distinguish from subordination to Serbia.



In turn, the other republics' efforts to insulate themselves from this risk—including moves to assert their own sovereignty and ultimately independence—constituted a threat to Yugoslavia's integrity, which threatened the interests of Serbs living in Bosnia and Croatia.<sup>64</sup> Milošević's position and appeal, after all, was not simply to Serbian nationalism but to Yugoslavism—it was this system that had provided a unified home for all Serbs and protected them within areas dominated by other communities. Milošević's ability to control and dominate the JNA arose partly from his ability to appeal to its federal instincts, even as it was becoming, increasingly, an instrument of specifically Serb interests.<sup>65</sup>

Perhaps the final shock to the rigid and unresponsive system of late (really, post-) Titoism was the introduction of multiparty elections. The literature on democratization is rich, and debate over the benefits and risks of transitioning to a participatory, democratic electoral model wide-ranging.<sup>66</sup> In Yugoslavia, the effect of elections appears to have been deeply destabilizing and was a direct contributor to the accelerated descent of the country into great violence.

In 1990, the LCY surrendered its political monopoly—not, however, as a unified and voluntary decision, but rather because of the party's evisceration and fracturing along republican lines; at the final, 14th LCY congress in January 1990, the Slovenian and Croatian delegations walked out en masse after all of Slovenia's proposals for reform and political autonomy were rejected by Milošević and his bloc.<sup>67</sup> Many observers consider that the state effectively ceased to exist at this point. Nonetheless, this was in fact a time of considerable political ferment, and when multiparty elections were held in the various republics during 1990, they brought non-Communist nationalists (or newly converted former Communist advocates of autonomy and independence) to power.<sup>68</sup> Political actors who were strongly opposed to any recentralization, or were openly nationalist, rose to prominence in the various republics, either within the Communist elites or on the outside. In Slovenia—where the highly homogeneous population made co-identification of republic and nation the least problematic of any in Yugoslavia—Communist officials, led by Milan Kučan, reconstituted themselves with little contradiction as defenders of Slovenian autonomy and then as post-Yugoslav Slovene national leaders. In Croatia, the new nationalist leadership was headed by

Franjo Tuđman, once a Partisan general, who had apostasized to Croatian nationalism in the late 1960s and spent the intervening years sometimes in prison and always in the political wilderness. Tuđman's *Hrvatska demokratska zajednica* (Croatian Democratic Union or HDZ) took power, and its moves to assert Croatian autonomy, including a new constitution that asserted a right of secession, were widely perceived by Croatian Serbs as threatening.<sup>69</sup> In Bosnia, various figures arose to represent different nationalist constituencies, including Radovan Karadžić representing Serbs, and Alija Izetbegović representing Bosnian Muslims (or Bosniaks, as they soon came to be called). Three nationalist parties—representing Serbs, Bosniaks, and Croats—shared victory and power, but from the outset were engaged in paralytic competition, as the terms of impending struggle, if not yet the fact of war, were clear to all.

Milošević, by this time already President of the Socialist Republic of Serbia—a position whose power was rapidly increasing with the collapse of Party hegemony—rebranded the League of Communists of Serbia as the *Socialistička partija Srbije* (Socialist Party of Serbia or SPS), and led it to victory; he became the president of the Republic of Serbia under a new constitution, which came to be known as the Milošević Constitution.<sup>70\*</sup> Elections were the vehicle for Milošević—already the dominant political actor in Serbia—to reinvent himself: no longer a Communist apparatchik, but a populist, socialist, and nationalist political leader.

The first significant acts of violence—the kind that observers at the time clearly understood as signaling something far more dangerous than mere protests—occurred in the summer of 1990. In Serb-dominated areas in the interior of Croatia, known as the Krajina, local militia forces formed and blockaded roads, in what became known as the Log Revolution. Over time, these militias, which declared a Serbian autonomous region within Croatia, received increasingly direct support from the JNA and Belgrade, even as local Croatian police and security forces militarized.

By late 1990, the atmosphere was one of full political crisis. The federal prime minister, Ante Marković, had had some success with economic reforms, but the leading political institutions at the federal level barely functioned. In late 1990, Slovenia held a referendum on independence and sovereignty, and in May 1991 Croatia held an ambiguously worded referendum arguably contemplating independence.<sup>71</sup>

On June 25, 1991, both states declared independence.<sup>†</sup> The JNA proceeded to take control of Slovenia's international frontiers, and Slovenian TO units resisted. With this, the first of the five wars of the Yugoslav dissolution began.

One of the great set-piece questions concerning the Yugoslav dissolution is whether the SFRY was a viable state or was bound to collapse—or at what point its dissolution became inevitable. It is a question that has affected the jurisprudence of the ICTY: Although the act of destroying a state, as such, finds no purchase in the ICTY's jurisdiction, many of the theories adopted by the Prosecution, and accepted in the Tribunal's jurisprudence, implicate broader political projects, such as the creation of a Greater Serbia or Greater Croatia.<sup>‡</sup> The act of proving senior leaders' legal responsibility for atrocities has gone hand in hand with claims that they engineered the initial resort to violence, which itself was also not a crime the Tribunal could adjudicate.<sup>§</sup> In *Milošević*, as we will see, the Prosecution's chosen theory of liability required it to make an argument about the political purposes of the killings and crimes during the wars that was difficult to distinguish from a critique of the wars' instigation itself.<sup>¶</sup> In this sense, the viability of the state—and the causes of its collapse—was as much of interest to the partisans of various parties arrayed at The Hague as in the former Yugoslavia itself.

## IV. War<sup>72</sup>

### A. Slovenia and Croatia

After 10 days of desultory fighting, the JNA forces withdrew from Slovenia. There has been considerable speculation about this decision:<sup>73</sup> Slovenes' resistance was perhaps greater than expected, but equally, the JNA's efforts were less than one might have expected of a military committed to the territorial integrity of its state. Milošević—who at one point had aspirations to become the strongman of all Yugoslavia—appears to have decided to focus his efforts on the core of republics in which his most reliable supporters lived and had national interests, rather than in peripheral areas such as Slovenia in which there were no significant Serb communities;<sup>74</sup> the abandonment of Slovenia certainly was consistent



with the realignment of the JNA, and Milošević, around Serbian nationalism.

With the successful withdrawal of Slovenia, it was clear that Croatia—already well down the same path—would not be easily deterred from independence, which the large Serb minority there perceived as an urgent and existential threat. That summer, then, a far more violent conflict broke out in Croatia, with active intervention by the JNA—whose actions in the very earliest phases appeared aimed at maintaining order and defending Serb interests, but soon morphed into open action to ensure control by Serb forces. Unlike the short conflict in Slovenia, the struggle in Croatia was protracted and violent, with massed military formations, sieges of large cities, atrocities, and concentration camps. The JNA possessed vastly superior weaponry, but had difficulty mobilizing effective and motivated units; the Croatian forces had materiel as well, especially after they successfully seized JNA depots inside Croatian territory, and garnered considerable diplomatic support from the international condemnation of Serb sieges at Dubrovnik, Vukovar, and Osijek, which included massacres of civilians. By January 1992, with the fall of Vukovar but also some Croatian successes, the frontlines had stabilized; Serb forces controlled several areas together constituting nearly one-third of Croatia, on which they formed the *Republika Srpska Krajina* (Serbian Republic of Krajina or RSK).<sup>75</sup> A United Nations Protection Force, or UNPROFOR, established in February, was interposed between Croatian and RSK positions.<sup>76</sup> The JNA withdrew from most areas, but continued to supply the *Srpska Vojska Krajine* (Serbian Army of the Krajina or SVK). Many European states recognized Croatia's independence starting in December 1991.\*

## **B. Bosnia**

Just as the implications of Slovenia's withdrawal for Croatia were apparent to all parties, so the deepening crisis in Croatia presented an obvious danger in Bosnia. Bosniaks and Croats were increasingly concerned about the prospect of remaining in a smaller Yugoslavia dominated by Milošević's Serbia. At the same time, Bosnia's Serbs—much like their co-ethnics in Croatia—were concerned by the prospect of losing the protection of the overarching Yugoslav state. Croatia, meanwhile, had an interest in the Croat-populated areas of Bosnia, and

indeed Tuđman and Milošević held a series of meetings in 1991 during which they discussed the possibility of partitioning Bosnia—discussions that later proved significant for the Prosecution’s accusation that Milošević was involved in a JCE to create a Greater Serbia.\* The departure of Croatia—and the evident determination of Belgrade to oppose this move militarily—signaled to all observers that conflict in Bosnia was likely.

Bosnia’s coalition—composed of the three leading nationalist parties—was increasingly unable to act. Bosniak and Croat leaders looked to assert the republic’s sovereignty and its right to exit from a Serb-dominated Yugoslavia; Serbs, led by Radovan Karadžić, warned that Serbs would not be made to leave their common state, and efforts to take Bosnia out of Yugoslavia would lead to war. Parties on each side were preparing for political division and conflict, though in very different ways: Bosniaks and Croats moved toward withdrawal from Yugoslavia—in late January 1992, the Bosnian Assembly, without the participation of its Serb members, withdrew from all participation in federal institutions and announced an independence referendum; they also prepared militarily, although the Bosniaks, led by Izetbegović, continued to rely on the JNA’s (now implausible) neutrality and consequently made fewer efforts. Serb communities organized a series of parallel autonomous provinces and so-called crisis staffs, some of which received weaponry from the JNA, which coordinated increasingly closely with the Bosnian Serb leadership.<sup>77</sup> Serbs had organized a referendum in November 1991 demanding to remain part of Yugoslavia or become independent, and in early January 1992, the self-organized Assembly of Serbian People of Bosnia and Herzegovina declared a Serbian Republic of Bosnia and Herzegovina, which anticipated control over wide areas of Bosnia, including areas in which Serbs were a minority.<sup>78</sup> These moves—preparatory, anticipatory, preventative—generally predated the crimes that the ICTY later charged against members of the Serb leadership, but were critical to the main causal and intentional narrative of the Prosecution’s cases, which in this sense conflated the decision for war and the conduct of that war.

There were significant episodes of violence during the early months of 1992, and clear preparations for conflict, but unlike in Croatia—where the descent into war was more gradual—full-scale fighting broke out rapidly in Bosnia following a series of political and diplomatic moves. In January,



the European Community's Badinter Arbitration Commission had called for Bosnia to demonstrate, through a referendum, that there was popular will for independence.<sup>79</sup> In the referendum, held in February and March 1992, an overwhelming majority of votes cast supported independence—but the vast majority of Serbs boycotted the vote.<sup>80</sup> Bosnia formally withdrew from the SFRY in early March 1992; sporadic fighting—and preparations—intensified throughout that month. Open warfare broke out in early April on the day the E.C. recognized Bosnia's independence: \* JNA—effectively Serb—forces besieged Sarajevo and rapidly took control of a majority of Bosnia's territory. Bosnian government forces—at this point still consisting of representatives of all ethnic communities, though predominantly Bosniak—held central Sarajevo, much of the middle and west of the country, and what became isolated Bosniak enclaves in the east, near the Drina.<sup>81</sup>

Both Bosniaks and Croats had voted in the referendum in favor of departing a Serb-dominated Yugoslavia, but this hardly implied an identity of interests; for many Croats, especially those in ethnically highly homogenous areas of Herzegovina, exit meant union with Croatia. In 1993, the uneasy coalition between Bosniaks aligned with the recognized Bosnian government and Croats aligned with the self-declared Croatian Republic of Herceg-Bosna collapsed completely, and exceptionally vicious fighting broke out between them in Herzegovina and central Bosnia, even as fighting continued with Serb forces elsewhere. The main Herzegovinian town of Mostar was divided, and several Croat enclaves formed within Bosniak-held areas; fighting there was intense, and several of the most prominent trials at the ICTY focused on events in these areas.<sup>82</sup> Most Croat-held territory was contiguous with Croatia, however, which both supplied Herceg-Bosna and exercised effective control over it. By contrast, Bosniak territory was broken into discontinuous, besieged enclaves with tenuous supply lines; at the nadir of their fortunes, Bosniak forces held just 10 percent of Bosnia's territory.

The early stages of the war—in 1992 between the JNA with its Serb allies and the Bosniak and Croat forces, and in mid-1993 between Bosniaks and Croats—were the most violent and destructive.<sup>83</sup> Sarajevo was immediately surrounded and besieged by the JNA and then by the new Bosnian Serb army, the *Vojska Republike Srpske* (Army of Republika

Srpska or VRS), and subjected to sustained shelling and sniping that took thousands of lives and reduced the population to desperate material circumstances. In time, however, many of the frontlines became relatively static, holding until 1995. The siege of Sarajevo continued until nearly the end of the war, and the city became a focal point for international attention, including both humanitarian aid and, later in the war, efforts to redress the military imbalance by pressuring the Serbs to withdraw their heavy artillery from the siege zone.<sup>84</sup> Sarajevo and five other areas in which Bosniak forces and civilian populations were surrounded by Serb forces were declared UN safe areas, remaining besieged until July 1995, when two of them, Srebrenica and Žepa, were overrun.<sup>85</sup>

### C. War aims

Considerable debate surrounds the war aims of the various parties—debates that proved central to the competing theories advanced in *Milošević* about the relationships among various Serb forces.\* There were relatively few areas in which the warring parties took or held territory to which their ethnic communities had no prior relationship. This does not mean they were the exclusive or even majority populations in those areas; in the Drina valley in particular, large areas that came under Serb control had had Bosniak majorities. Nor does it mean they did not try to go further: Serb attacks on coastal areas of Croatia often reached far beyond areas of Serb settlement. The point, rather, is that there were few areas over which a given side gained control that had not had a significant population from that side prior to the war.<sup>†</sup>

The territorial dispensation during the war—quite apart from being only a function of relative military success—was therefore consistent with various purposive theories: a war to consolidate and control territory already populated by the nation, a self-protective war in which success in holding ground roughly tracked with demographic dominance, or a war of conquest that only came to a halt in the face of other communities' self-protective resistance.<sup>86</sup> In later advancing its claims about the aims of the various parties, especially Croat defendants and those involved in a Greater Serbian JCE with Milošević, the Prosecution was inevitably choosing among these interpretations, some of which were about purposes

of fighting rather than the criminal means by which those purposes were accomplished.

The stabilization of the front lines—including the seeming reluctance of the VRS to actually take Sarajevo—tends to counsel against viewing the Bosnian and Croatian wars as ones of conquest *simpliciter*. Certainly the Prosecution's own predominant theory—that Milošević and his compatriots were involved in a JCE to create and maintain a single state in which all Serbs would live—necessarily was premised on a belief (if one which the Prosecution itself did not acknowledge) that the Serb war aims were self-limiting, having as their object the consolidation of territories that could have been drawn in advance by anyone with a suitably accurate map of Yugoslavia's demography and a particular sense of history.<sup>‡</sup>

#### **D. The actual crimes and their relationship to the leadership**

But whatever the aims and the dispensations of territory, they were achieved during and through profound violence. It was this violence that prompted and justified the work of the Tribunal, and in turn caused the Tribunal to delve, imperfectly, into the origins and purposes of the conflict. All wars have their own patterns of violence—indeed the wars in Bosnia and Croatia were themselves often highly localized, with different modes of fighting and atrocity—but the signal crimes of the Croatian and Bosnian conflicts were very much of a piece: the concentration camps, deportations, rapes and killings that together came to be known as ethnic cleansing.<sup>87</sup>

Thus in eastern Croatia in late 1991, ethnically mixed areas of Slavonia were rapidly homogenized by both the general fighting and specifically targeted atrocities, often committed by roving paramilitaries. In eastern Bosnia, along the Drina, Bosnian Muslims who constituted majorities or lived in highly mixed communities were violently driven from their homes by Serb paramilitaries, using demonstration killings and rapes to encourage their departure; in Višegrad, Bosniaks were executed and thrown from the historic Ottoman bridge into the Drina.<sup>88</sup> In the struggle in central Bosnia, Croats and Bosniaks engaged in raids and counter-raids, aiming to establish zones of dominance. In the Lašva Valley, for example, Croat forces conducted raids, accompanied by sustained shelling, during which massacres were then frequently carried out, with



the remaining population fleeing or being driven out.<sup>89</sup> Generally, ethnic cleansing targeted not only the physical presence of heterogeneous populations, but marks of cultural identity, such as religious structures.<sup>90</sup>

Populations were not always immediately expelled; in many cases, after control was established the nondominant communities were subjected to regimes of persecution. Parts of the community—usually males of fighting age (generously defined), but sometimes also women—were incarcerated. Notionally these were containment camps, but in practice many were places of torture and execution. Camps were established by all three parties—the *Čelebići* trial, for example, focused on a camp run by Bosniak and Croat forces—but by far the largest number of camps, and the most notorious, were established by Serb forces. The first trial held by the ICTY, *Tadić*, involved a Serb guard active at several camps near Prijedor, and there were many more such trials.<sup>91</sup> Similarly, the broader campaign of ethnic cleansing was clearly most intensive and violent in areas under Serb control, though there were also clear and highly effective acts of ethnic cleansing by Croats and Bosniaks, and it is true that, by war's end, areas under the control of all three warring parties had been comprehensively homogenized.

In explaining these patterns of violence, some have pointed to the particular qualities of the combatants—different levels of civilization or traditions of tolerance<sup>92</sup>—but a more realistic rationale can be found in the political logic driving the violence: The Serbian nationalist project, which sought to preserve a maximally imagined Serb-populated territory within one state, perceived the presence of other populations as a threat to that project—accurately, we might note, given the determination of Croatia and the other two constituent nations in Bosnia to withdraw from the common Yugoslav state. By contrast, Croat and especially Bosniak positions were premised on withdrawal and drew on considerably weaker material and military resources—and were reliant on international support. This is not to approve the methods by which these political programs were undertaken, only to note that they followed a certain logic, much as any political program that involves great violence does. Indeed, to suppose otherwise would be to say something entirely different about the nature of the violence that did occur, and therefore about responsibility for it; certainly, in *Milošević*, the Prosecution's theory of Greater Serbia

and the Accused's defense of Serbs' role in the wars each inevitably implicated a claim about the logic of what had happened—that it was not primordial or atavistic, but rational.

The general pattern of these practices—the visitation of terror on towns and villages, and the systematic confinement and torture of large groups—quickly became well-known and was thoroughly documented by human rights groups and, later, by the Tribunal. However, the precise relationship of this pattern to higher leadership in Knin, Pale or in Belgrade—the question with which Milošević's trial was concerned—was by its nature more complex and contested.

JNA forces fought openly in the early stages of the war, but—in part bowing to the legal and political logic that attached to Bosnia's independence and recognition at the UN—withdrew in May 1992. Large amounts of materiel and personnel were left behind and reconstituted as the VRS. Throughout the war, the VRS continued to receive significant and sustained financial, logistical, and operational support from the JNA and its successor, the *Vojska Jugoslavije* (Army of Yugoslavia or VJ), but—in contradistinction to the later events in Kosovo—the claim that Milošević was criminally responsible for actions committed by the VRS required a more difficult level of proof, because he had no de jure authority over these forces, and his responsibility required a much more complex showing that he had de facto authority over them—something that would necessarily need to be demonstrated across repeated moments in the long conflict. VJ units occasionally fought inside Bosnia as well, as did elements of the state security branch of Serbia's *Ministarstvo unutrašnjih poslova* (Ministry of Internal Affairs or MUP). The involvement of these units in Bosnia, as well as the measure of control the VJ exercised over the VRS, presented one of the key opportunities for the Prosecution to make a case for Milošević's direct, formal control over actors and events there.

Irregular and paramilitary units were particularly essential to the ethnic cleansing operations. In addition to local militias, there were also, especially in Eastern Slavonia and eastern Bosnia, sizable paramilitary forces identified with particular commanders—such as Arkan's Tigers or the *Škorpioni*, who were involved in the killings at Srebrenica. In the early stages of the conflicts in Croatia and Bosnia, some of these groups operated with considerable (or apparently considerable) autonomy. Other

paramilitaries were incorporated more directly into the Serbian security services, constituting specialized units within the state security half of the MUP—the *Jedinica za specijalne operacije* (Special Operations Unit or JSO, also known as the *Crvene Beretke* or Red Berets), for example, partly incorporated Arkan's previously autonomous forces, but under the control of Serbian state officials who were identified as part of the JCE with Milošević. Just as with the VRS, to which Milošević had no de jure connections, the problem of linking these complex, interrelated but also sometimes minimally controlled forces to each other and to higher levels of leadership was an interpretive challenge that was essential to the kinds of claims made in *Milošević*.\*

## **E. To Dayton**

Western powers were closely involved in the Croatian and Bosnian conflicts from the beginning through diplomacy, sanctions, and later, military intervention.<sup>93†</sup> The European Community established guidelines for recognizing new states, and the Conference on Yugoslavia and various mediators—Carrington, Stoltenberg, Vance, Owen—repeatedly attempted to negotiate peace. Along with the other main leaders—Izetbegović, Tuđman, Karadžić—Milošević was involved in several of these meetings, which were variously held in Geneva, New York, and other places. In one notable incident, after a summit in Athens, Milošević attended a meeting of the assembled Bosnian Serb leadership in Pale to support the recently concluded peace plan, but was rebuffed, along with the plan.<sup>94</sup> Incidents such as this later complicated the Prosecution's efforts to demonstrate Milošević's effective authority over the Bosnian and Croatian Serbs for the duration of the wars.

After fighting broke out in Bosnia, the UNPROFOR mission—already positioned as a tripwire in Croatia—was reconfigured as a peacekeeping force in the Bosnian conflict. UNPROFOR in Bosnia lacked the kind of robust mandate, armaments, and political support that might have allowed it to actually constrain the fighting. On several occasions, UNPROFOR forces were taken hostage by VRS units and used as bargaining chips, especially as NATO—whose members Britain and France had the most significant contingents in UNPROFOR—became more directly involved.<sup>95</sup>

Over time U.S. involvement—which early on had conceded the predominant role to European powers—became more intense, leading to rapprochement between the Croat and Bosniak forces under the Washington Agreement in 1994. After this, the terms of combat turned against the previously dominant Serb forces, which began to lose ground. In May 1995, Croatian forces retook Western Slavonia in Operation *Bljesak* (Flash), followed in August by the much larger Operation *Oluja* (Storm) that retook the entire Krajina, from which the Serb population fled. Operations continued into neighboring Bosnia, and in short order combined Croatian, Bosnian Croat, and Bosniak forces had seized much of western Bosnia and were threatening the Bosnian Serb center at Banja Luka.

In the meantime, in July 1995, Serb forces under General Ratko Mladić seized two of the three Bosniak enclaves in the Drina valley; in Srebrenica, the VRS separated women and children, then detained or hunted down the male population and killed them, more than seven thousand, in the single act from Bosnia that the ICTY has judged to be genocide. In July 1995, the ICTY issued indictments against Mladić and Karadžić for crimes relating to the siege of Sarajevo, and in November, for Srebrenica.<sup>96</sup> Later, Milošević would be indicted on very similar charges, but this did not happen until 2001, after he was already in the Tribunal's custody for the *Kosovo* indictment.

By late 1995, however, Milošević was increasingly central to diplomatic efforts to end the wars. In November 1995, Milošević, Tuđman, and Izetbegović met in Dayton, Ohio, to negotiate a final settlement for the Bosnian conflict, which was signed in December in Paris. In August Milošević had secured authority to negotiate on behalf of the Bosnian Serb leadership, which was excluded from the conference. The Dayton Accords concluded the conflict, provided for the deployment of a very large NATO-led force, initially called the Implementation Force or IFOR, and created an extraordinarily confederalized Bosnian state.<sup>97</sup> The contours of a settlement in Croatia had been largely determined by the overwhelming victory of Croatian forces; only part of Eastern Slavonia, along the frontier with Serbia, remained in Serb hands, and that territory was transferred to the United Nations Transitional Authority for Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) in anticipation of eventual reincorporation into Croatia.<sup>98</sup>



One of the forms that outside intervention took was the establishment of a Commission of Experts to investigate war crimes,<sup>\*</sup> followed, in 1993, by the creation of the International Criminal Tribunal for the Former Yugoslavia. At the time, these measures were seen, plausibly, as motivated at least in part by a desire on the part of the major European powers and the Security Council not to do more—not to risk more extensive military intervention.<sup>99</sup> The Tribunal is discussed in the next chapter.

## F. Kosovo<sup>100</sup>

Kosovo was the region whose troubles paved Milošević's path to power, and in which the contours of the Yugoslav dissolution first appeared; many observers had thought it would also be the first to erupt in violence. In the event, Kosovo remained tense but quiescent throughout the wars of the early 1990s. With the conclusion of peace at Dayton, however, and the consequent realization that their concerns had been excluded from the negotiations, Kosovar Albanians became more radicalized. In 1996, the first armed units of the *Ushtria Çlirimtare e Kosovës* (Kosovo Liberation Army, KLA or UÇK) appeared. By late 1997, large areas of the province were intermittently controlled by the KLA, and Serbian security forces were deployed in active efforts to suppress the guerilla movement.

In contrast to their earlier equivocation in Bosnia, the major Western powers acted resolutely, even aggressively. The United States in particular was actively engaged in diplomatic efforts to forge a resolution to the conflict. In late 1998, NATO reached the brink of military intervention, issuing the first activation order in the history of the alliance, but pulled back after a ceasefire was agreed, with the insertion of international monitors called the Kosovo Verification Mission (KVM). Both Serbian forces and the KLA used this period to regroup, however, and after a particularly brutal and well-publicized massacre in the village of Račak (Reçak) in January and the failure of negotiations in Rambouillet, NATO began aerial bombardment throughout Serbia on 24 March 1999.<sup>†</sup>

A few hundred thousand Kosovar Albanians had already fled across the frontiers or been internally displaced, but immediately after the start of NATO's campaign Serbian forces dramatically escalated their efforts. In the course of the conflict, Serbian forces killed about 6,200 Kosovar Albanians and expelled some 750,000 across the borders, with the most



intense displacements occurring in the first weeks of the air war.<sup>101</sup> Hundreds of thousands of other Albanians were internally displaced within Kosovo, having either fled their homes or been driven out by Serb forces.<sup>102</sup> As in Croatia and Bosnia before, a typical pattern of violence appeared. Combined military and police or irregular forces would surround a village and shell it, then round up the population and, after taking their identity documents, drive them toward the frontiers. Large populations were also deported from Pristina on buses or trains.<sup>103</sup>

During this period, NATO's bombing campaign intensified. The bombing, which progressively targeted military and communications targets throughout Serbia, killed some five hundred civilians and caused widespread damage to infrastructure.<sup>104</sup> KLA forces also remained active. During his trial, Milošević claimed that Kosovar Albanians were fleeing the bombing, but witnesses in the trial—and refugees interviewed at the time—reported otherwise.<sup>105</sup>

Two months into the air war, the ICTY Prosecution issued the *Kosovo* indictment against Milošević and four other leading figures in the FRY and Serbia.<sup>106</sup> A few weeks later, following negotiations with Russian and Finnish envoys, Milošević agreed to a settlement. A Military Technical Agreement was signed at Kumanovo in Macedonia, providing for the withdrawal of Serbian military and police forces and the insertion of a large NATO force, the Kosovo Force or KFOR, into Kosovo.<sup>107</sup> Russian forces stationed in Bosnia made a rapid move through Serbia—with the enthusiastic support of Belgrade and most Serbs—and took up positions in Kosovo, an implicit counterweight to NATO and defender of the Serb population, which at war's end remained in small enclaves throughout the territory and in a large area north of the Ibar River, including half of Kosovska Mitrovica (Mitrovica).

The Chief Prosecutor, Louise Arbour, ordered an internal inquiry into NATO's actions that was completed under her successor, Carla Del Ponte; this inquiry—which in an unprecedented move was made public—recommended against any investigation of NATO for any actions in the war.<sup>108</sup> Later, the ICTY issued further indictments for other senior Serbs involved in Kosovo, as well as indictments against members of the KLA.<sup>109</sup>

## G. Macedonia

Throughout the 1990s, Macedonia had avoided the conflicts that ravaged several other former republics, but tensions between its ethnic Macedonian and Albanian communities were high. A concern with the internal fragility of Macedonia and with the risk of violence from Serbia led to the deployment of a peacekeeping force—originally drawn from UNPROFOR, later renamed United Nations Preventive Deployment Force or UNPREDEP—which has been widely viewed as a rare successful example of preemptive action.<sup>110</sup> UNPREDEP remained in place through the early and mid-1990s, but in early 1999, China vetoed the renewal of its mandate in retaliation for Macedonia's recognition of Taiwan. The subsequent resolution of the Kosovo conflict also placed former KLA men and arms at the disposal of the newly formed *Ushtria Çlirimtare Kombëtare* (National Liberation Army, NLA or UÇK), and the uneasy peace broke down in 2001. The conflict was brief and a peace deal was quickly brokered. The ICTY issued a small number of indictments for this, the last significant conflict of the Yugoslav wars.<sup>111</sup>

## V. Possible Legacies: Postwar Political Developments, Judicial Responses, and Evidence of Reconciliation

The Tribunal is concerned only with a defined set of crimes that occurred during the wars in the former Yugoslavia; none of its indictments concern any events after the Macedonian conflict of 2001; \* Milošević himself was charged with crimes committed between 1991 and 1999. The subsequent period is of interest, however, because it is the context against which the *Milošević* trial itself and the work of the Tribunal played out. The trial was experienced in real time, as it unfolded, and was both influenced by events in the region—political changes that made states more or less cooperative with the Tribunal, for example—and, perhaps, influenced those events.† Moreover, many claims have been made for the social and political effects of the Tribunal—for its potential to promote reconciliation or the rule of

law, for example—which would necessarily have materialized, if at all, during the period since the wars ended.

### **A. Postwar**

With the end of the Kosovo conflict and the rapid suppression of incipient war in Macedonia, the wars that began in 1991 appear to have reached their conclusion—though that is a prediction whose optimism may look foolish in a few years—and a period of peace and considerably greater stability began.

*Slovenia*, always the wealthiest member of the SFRY, with the least contested frontiers and most homogenous population, had in many respects the least troubled transition. During the 1990s, while its neighbors were convulsed by war or economic sanctions, Slovenia was already consolidating its post-Yugoslav position and moving rapidly toward integration with the European Union, joining in 2004—fewer than three years after the last regional war had ended. Indeed, although Slovene businesses are well integrated into the region and its diplomacy active, so comprehensive has the shift in fortunes been that Slovenia is no longer conventionally identified as part of the same geographic region—the Western Balkans—as the other former republics of the SFRY.

*Croatia* completed the formal consolidation of its territory in January 1998, with the reintegration of Eastern Slavonia. Its postwar demography is radically altered: With the departure of most of its prewar Serb minority and an influx of Croats from Bosnia and Serbia,<sup>112</sup> it is now highly homogenous. The wartime dominance of Tuđman's HDZ persisted until 2000, when it was replaced by a center-left coalition. Tuđman himself died in 1999; he was never indicted by the ICTY though it was revealed that he had been the object of investigation, and that a proposed indictment of him had been rejected in an internal review; in later cases Tuđman was named as an unindicted co-perpetrator.<sup>113</sup> Under Tuđman, Croatia frequently had a combative relationship with the ICTY. Later Croatia began to cooperate more fully; even so, the ICTY's prosecution of prominent generals, such as Tihomir Blaškić and Ante Gotovina, produced a strongly negative reaction in large segments of the Croatian public, and the broader narrative of the *Domovinski rat* or Homeland War as a patriotic and national liberation has largely been insulated from the negative implications of individual



convictions.<sup>114\*</sup> Although it suffered severe economic dislocation during the war and after, Croatia has successfully made a number of economic and structural reforms, and became a member of the EU in July 2013.

**Dayton Bosnia:** Nowhere in the former Yugoslavia was the fighting as intense, sustained, and comprehensive as in Bosnia. Most of its territory was the scene of fighting at some point in the war, and the levels of death and displacement—one hundred thousand people killed, and perhaps half of the total population displaced<sup>115</sup>—were similarly greater, though this is only a relative difference. Most critically, the ethnic separation of the population—which had been among the most mixed in the former Yugoslavia—was thoroughgoing, such that at war's end there was near total homogeneity in the zones controlled by the three warring parties.<sup>†</sup>

At war's end, with the agreement at Dayton, Bosnia was recognized as a single state, but an extraordinarily decentralized one. The country is divided into two entities: one, the Republika Srpska, is a centralized quasi-state dominated by Serbs. The other, the Federation (itself a product of the wartime Bosniak–Croat alliance) is further decentralized into cantons—some of which are dominated by Croats, others by Bosniaks, with a few that are mixed—that exercise most of the power. Bosnia's central government has very few and very limited powers, and most of those are subject to veto mechanisms designed to defend the interests of the entities or of the three constituent nations.<sup>116</sup>

This extreme decentralization has been considerably counterbalanced by a sustained international intervention. Bosnia's constitution is actually an annex of the Dayton Accords negotiated by the United States, Milošević, Tuđman, and Izetbegović. The Office of the High Representative, or OHR—also a creature of Dayton—was given plenipotentiary power to govern the country. Over time, the international oversight mechanisms established at Dayton took a more direct role in the governance of Bosnia, producing significant measures of integration, such as the introduction of a common currency and phone system, and unification of the armed forces. The OHR has also been instrumental in such gestures toward acknowledgment and reconciliation as have occurred in Bosnia.<sup>‡</sup>

Under sustained international pressure, a significant number of displaced persons have returned as well, most notably during the years

between 2000 and 2004. Estimates place the total number of returns at over one million, of which some four hundred thousand are so-called minority returns—individuals who returned to areas controlled by one of the other nations. The demography of return is complex, however, Many returns counted by UNHCR were transitory in nature; the success of return efforts were in part due to a shift in focus from actual return to the reclaiming of property, which was often sold on. Many of the actual returns that have occurred have been to areas along the Inter-Entity Boundary Line or to relatively isolated communities, whereas returns to urban areas have been rarer.<sup>117</sup>

These institutions of international governance have themselves been subject to considerable criticism on the grounds that they override democratic mechanisms; the Dayton framework as a whole has been criticized for entrenching or even reifying ethnic difference,<sup>118</sup> though it is probably more accurate to say that it has failed to counter ethnic divisions that had been made overwhelmingly salient by the events of the war. There have been numerous attempts at constitutional reform in Bosnia—aiming both to reduce the role of ethnicity in the governance structure and to remove the international protectorate—but none have been successful. The influence of the wartime leadership has waned considerably due to death, incarceration (for prominent Bosnian Serbs such as Karadžić and Mladić), or international pressure, but the parties and actors replacing them are not necessarily less nationalist. In many respects, one project for which Milošević and his associates were charged—the creation of an ethnically pure Serb state on the territory of Bosnia—was successfully realized.<sup>119</sup>

**Kosovo:** At the end of the war in 1999, the displaced Kosovar Albanians rapidly returned; there was a brief surge of violence against Serbs and Roma, and large parts of the Serb population fled or resettled in the north of the province; although the north is now by far the largest single Serb settlement and the only significant urban population, sizable communities have remained in enclaves in the south, and constitute the majority of the remaining Serb population.

The Security Council had not approved NATO's use of force in Kosovo, but shortly after the cessation of hostilities, the Council passed Resolution 1244, recognizing KFOR's presence and establishing a UN

administration for the province, the United Nations Interim Administration Mission in Kosovo (UNMIK).<sup>120</sup> Initially, UNMIK sought to promote a process called “standards before status,” aimed at ensuring functioning, rights-respecting governance before deciding on the province’s future, but in 2004 major riots broke out across Kosovo, prompting abandonment of efforts to normalize the situation prior to a final settlement.<sup>121</sup> Several years of fruitless negotiations followed, at the end of which UN Envoy Martti Ahtisaari proposed a plan for independence with highly decentralized governance, strong minority protections, and continued international supervision. In 2008, Kosovo’s provisional Assembly and president issued a unilateral declaration of independence; many countries rapidly recognized the new state, but Serbia and its supporters, notably Russia, have adamantly resisted.<sup>122</sup> Kosovo’s independence is now an established fact, although it is equally true that the new state does not control the Serb-populated north, which Belgrade continues to subsidize. The 2013 agreement between Serbia and Kosovo, brokered under EU auspices, which transfers some responsibilities to Pristina and incorporates northern Serb institutions into the Kosovar state, has not been accepted in the Kosovo Serb north itself, and has not significantly altered the division of the territory, at least as yet.\*

**Serbia**, the largest unit in the former Yugoslavia and the overwhelmingly dominant partner in the FRY, remained under Milošević after the conclusion of the war in Kosovo, but his rule was increasingly challenged. The opposition—long feckless and divided—unified around a single candidate, Vojislav Koštunica, and in late 2000, the opposition coalition defeated Milošević in a direct presidential election. Sustained protests culminated on 5 October—a date that has entered Serbian parlance—compelling Milošević to concede defeat and resign.†

The opposition took power, headed by Koštunica at the federal level, and by Prime Minister Zoran Đinđić for Serbia. Koštunica and Đinđić were frequently at odds about the direction of post-Milošević Serbia—Koštunica, though an opponent of Milošević, was himself a committed nationalist, Đinđić less so and more willing to undertake reforms after the transfer of power; they also disagreed on sending Milošević to The Hague.‡ The security services, which had switched their allegiance at a critical moment during the protests, retained considerable power in post-



Milošević Serbia, but after elements of the JSO assassinated Đinđić in 2003 (partly because of his willingness to cooperate with the ICTY), their power was broken.<sup>8</sup>

The end of Milošević's regime also accelerated the dissolution of the FRY. Montenegro, long the junior republic in the FRY and a loyal subordinate of Serbia in the early years of the conflict, had gradually moved out of Belgrade's orbit under Milo Đukanović. By the time of the Kosovo conflict, Montenegro, though still a republic in the FRY, was effectively neutral. Đukanović, then Montenegro's president, was no longer attending meetings of the *Vrhovni savet odbrane* (Supreme Defense Council or VSO), for example.<sup>123</sup> In 2003, a new federal arrangement was agreed, called the State Union of Serbia and Montenegro, which included provisions for an independence referendum. In 2006, Montenegro declared independence; all federal institutions of the FRY were dissolved, and Serbia reorganized itself as a fully sovereign state.

Sanctions against the FRY were progressively lifted, although a different form of external pressure—conditionality for accession to the European Union<sup>9</sup>—appears to have successfully moved the Serbian government toward greater cooperation with the Tribunal, including the arrests of Karadžić in 2008 and Mladić in 2011.<sup>124</sup> The key geopolitical and constitutional challenge in Serbia, however, remains the status of Kosovo: At all points, Serbia has maintained its claim to sovereignty, and no political actor has been willing to concede the loss of the province.

***Macedonia under Ohrid:*** Following the brief conflict, representatives of the two communities—ethnic Macedonians and ethnic Albanians—agreed, under considerable international pressure, to a decentralizing arrangement called the Ohrid Agreement, which greatly expanded Albanians' access to control over education and governance in areas they inhabited. Relations between the communities remain quite distant, although governments have tended to be combinations of Macedonian and Albanian parties. Macedonia became a candidate for accession to the European Union in 2005. The country's diplomatic position has remained somewhat tenuous, however, in part because of a continuing dispute with Greece over the country's name that has kept it from full membership or participation in various international fora.

## B. Other juridical responses to the wars

The ICTY (with which the next chapter is concerned) is not the only judicial mechanism designed to respond to the atrocities of the Yugoslav wars, and its jurisprudence has in some cases interacted with and affected those other judicial efforts to regulate or evaluate the effects of the Yugoslav crisis. There have also been several significant cases at the International Court of Justice (ICJ). The most consequential, especially from the perspective of the *Milošević* trial, was the genocide case filed against Serbia by Bosnia.<sup>125</sup> The *Bosnian Genocide* case, first filed in 1993, was finally decided in 2007. It accused the FRY—later, Serbia—of violating the Genocide Convention, including committing or aiding and abetting genocide in Bosnia. Given that the decision came less than a year after Milošević's death, the case was seen as a real and symbolic opportunity to vindicate claims that would not be adjudicated in *Milošević*.

But the case was consequential long before it was known that Milošević's trial would not reach judgment. Indeed, in certain respects, the case was, potentially, far more important for Serbia and Bosnia than was *Milošević* or, indeed, any trial at the ICTY. The ICJ's cases concern state, rather than individual, responsibility, and in theory the Court could have ordered Serbia to make extensive and onerous reparations of various kinds.<sup>126</sup> In addition, a finding that Serbia was responsible for genocide would have been deeply embarrassing and delegitimizing. Certainly, one political aim that many Bosniaks attached to the case was the delegitimization of the Republika Srpska as an entity created by genocidal means.\*

It is in part for these reasons that Serbia so assiduously resisted the release of the minutes of the VSO, documents that the ICTY Prosecution had subpoenaed for use in *Milošević*. Although notionally it had an absolute obligation to cooperate with the Tribunal, Serbia demanded that the documents be redacted and that any further dissemination be prohibited. Because of these restrictions, in which the Prosecution and Chamber ultimately acquiesced, the ICTY did not hand the documents over to the ICJ for use in *Bosnian Genocide*.†

In its decision, the ICJ found that Serbia had violated its obligations under the Genocide Convention, but only with reference to the obligation

to prevent and punish: The Court accepted that genocide had been committed at Srebrenica by elements of the VRS—consistent with the ICTY’s jurisprudence—but did not find that Serbia itself was directly responsible for genocide.<sup>‡</sup>

After the ICJ issued its decision, many observers criticized the Court for reaching its conclusion without more robustly engaging the available evidence—in particular, the VSO documents. Redacted versions have been made public, but naturally it is precisely the redacted portions that occasion the greatest interest. Of course, without their full release, it is impossible to say with confidence what the VSO documents would reveal about Milošević’s or Serbia’s responsibility. But in the event, a case that many hoped would provide a kind of objective imprimatur for a shared truth has evidently contributed little to that aim.<sup>127</sup>

Several other cases before the ICJ arose out of the Kosovo conflict. While the Kosovo war was ongoing, the FRY filed claims against various members of NATO for alleged violations of international law arising out of the bombing campaign. The ICJ ultimately dismissed all the cases on jurisdictional grounds.<sup>128</sup> In 2008, Serbia persuaded the UN General Assembly to address a question to the ICJ, asking if “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law[.]”<sup>129</sup> The ICJ’s advisory opinion, issued in 2010, comprehensively avoided substantive claims about self-determination and secession, rendering a highly formalistic opinion that found the bare act of declaring independence did not violate international law; the opinion was so narrowly drawn as to be irrelevant, though in its context it represented a victory for an independent Kosovo.<sup>130</sup>

Domestic war crimes prosecutions have been institutionalized in several countries in the region, including Serbia, Bosnia, Croatia, and Kosovo, by creating special courts, which also deal with organized crime (activity that was often closely related to the prosecution of the wars themselves). Those in Bosnia and Kosovo have had international judges and prosecutors, and were established by their respective international administrations; the Serbian court was established under domestic legislation. Some of these courts, such as the *Odjel za ratne zločine, Sud Bosne i Hercegovine* (War Crimes Chamber, Court of Bosnia and



Herzegovina), have received cases transferred from the Tribunal,<sup>131</sup> as well as generating their own domestic cases.<sup>132</sup> The extradition of suspects from neighboring countries has been a source of tension.

### **C. Post-conflict reconciliation**

A central question of any inquiry into a trial such as *Milošević* is the degree to which such a case—and the institution in which it took place—has affected the broader course of reconciliation after the wars of the 1990s. There is little agreement on what exactly reconciliation is, beyond perhaps recognition that it must surely be something more than mere peace.<sup>133</sup> Even the minimal goal of restoring peace is generally thought to be linked in some way to forms of post-conflict justice.<sup>134</sup>

One of the core aspirations for the Tribunal and for justice mechanisms more broadly was an expectation that they would contribute in some fashion to the normalization of post-conflict societies and the reconciliation of divided communities.<sup>135</sup> Similarly, the institutions of international governance in Bosnia and Croatia, and the mechanisms of integration associated with the EU accession process, were expected to encourage (an admittedly indeterminately defined) reconciliation among the former warring parties—and sometimes consciously designed to do so.<sup>136</sup>

A decade and more later, the indicia of reconciliation that have been discerned—formal apologies, dialogue, reestablishment of economic ties, returns across the former front lines—are, even on the most optimistic readings, partial and incomplete, and surely far short of what the earliest advocates of postwar reform promised or imagined.<sup>137\*</sup> Serbian President Boris Tadić issued public apologies in Croatia and Bosnia, and the Serbian Parliament also issued a resolution that was as controversial as it was ambiguous,<sup>138</sup> whereas in the RS, a formal expression of regret was issued under considerable pressure and with direct intervention by the international community.<sup>139†</sup> Other states have recognized the occurrence of discrete crimes during the wars, though rarely in a way that would implicate the broader social and national aspects of the conflict.<sup>140</sup>

Initiatives to establish state or regional truth commissions or similar initiatives, such as the Regional Initiative for the establishment of the

Regional Commission for Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the Period from 1991–2001, or RECOM process,<sup>141‡</sup> have attempted to open broader dialogues about the wars across the new political boundaries, but to date there is little evidence of commonly shared narratives—about who was victim, and who perpetrator, about what was done and why—among the peoples of the seven states that not long ago constituted a single Yugoslavia.



## 2

# The Forum

## The International Criminal Tribunal for the Former Yugoslavia

Among the many responses to the Yugoslav crisis, the idea of a formal legal institution to adjudicate crimes was broached early on and heatedly debated, and indeed the judicial turn that ultimately resulted has been one of the principal legacies of the crisis. Until the Yugoslav wars, there had not been an international criminal tribunal since Nuremberg and Tokyo; now, in the wake of the Tribunal, creation of and resort to international courts has become a normal, if still contested, part of international relations in response to conflict.\*

## I. Controversies over Founding and Purpose

### A. A court in politics, a political court

To many observers, the establishment of the Tribunal looked not so much like the vindication of a commitment to justice as an attempt to avoid military intervention in the Bosnian and Croatian conflicts.<sup>1</sup> Before the Tribunal was created, a Commission of Experts was established, in October 1992, to investigate possible crimes and to determine the legal framework that might apply to them.<sup>†</sup> This Commission, first headed by Frits Kalshoven and then by Cherif Bassiouni, produced an Interim Report that was influential in discussions regarding the creation of a fully

empowered court; the Commission later produced a Final Report extensively documenting actions it considered criminal.<sup>2</sup> The Commission's mandate continued for some months after the establishment of the Tribunal, but during this period the Prosecution was only doing a small amount of investigatory work. The Final Report advanced forceful claims about organized campaigns of ethnic cleansing, but did not make specific allegations or recommend any charges against Milošević or the senior leadership in Belgrade.<sup>3</sup> The relationship of the Commission's work to that of the Prosecution, and the disposition of its Final Report—whether or not it should or could contribute to the Prosecution's indictments—was the source of some controversy, and its findings were not used in any direct way at the Tribunal.<sup>4</sup>

The International Criminal Tribunal for the Former Yugoslavia was established in May 1993 by the United Nations Security Council, acting under its Chapter VII authority to take measures to ensure “international peace and security.”<sup>5</sup> From the beginning, some observers have understood this use of the UN's power to mean that the Tribunal, though a juridical institution, also had an implicitly political function—a mandate to contribute both to ending the ongoing wars in Bosnia and Croatia, and to eventual postwar reconciliation; this reconciliatory potential and purpose of the Tribunal—though not expressly mentioned in Resolution 808, which spoke instead of restoring peace—was widely understood and assumed.<sup>6\*</sup> The Tribunal was also founded in a period of post–Cold War optimism about internationalism, itself part of a secular convergence between ICL, human rights, and humanitarian law, as well as of the judicialization of international relations and a new—or renewed—focus on individuals in international law.<sup>7</sup>

That convergence is complex and contested; it is not inevitable—in some ways it has already been challenged by the post–9-11 security environment, even as institutions of ICL have proliferated. The Tribunal was therefore a product of a set of contingent political circumstances, and it remains to be seen if that contingency's potential will become entrenched and impart a lasting legacy to international law and politics.

## **B. Jurisdiction and legality**

Regardless, the ICTY was first and foremost a court, charged with trying individuals accused of committing violations of recognized international law in connection with the conflicts in the former Yugoslavia.<sup>8</sup> It was given jurisdiction over the whole territory of Yugoslavia from 1991 until a still-undetermined date, for a defined list of crimes committed during armed conflicts. The Tribunal has concurrent and primary jurisdiction, meaning that although other courts (such as the domestic war crimes courts in Bosnia and Serbia) may also try cases, the Tribunal may take over a case if it determines that this is in the interest of international justice.

The Tribunal has jurisdiction over a specific list of crimes: genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war.<sup>9</sup> Some of these crimes had relatively clear definitions prior to the establishment of the Tribunal; others were ill-defined, of highly uncertain scope, or simply had not been much applied. The ICTY does not have jurisdiction over aggression, meaning that, in formal terms at least, its cases have not assigned responsibility for Yugoslavia's descent into war. But certainly there has been, surrounding the Tribunal, an expectation that it might do more than simply adjudicate atrocities. As we shall see, some of the Prosecution's strategies and theories implied or gestured toward claims about responsibility for the wars; this was perhaps most evident, unsurprisingly, in *Milošević*.

Out of concern for the principle of legal certainty and a desire to ensure the legitimacy of the new institution, the Tribunal was supposed to apply only law that was well established.<sup>10</sup> This juridical conservatism is an ideal, since the novel modes of cruelty any war produces will inevitably press upon textual and doctrinal limits devised in response to earlier conflicts. Thus, the signal, ethnic crimes of the Yugoslav wars combined with the naturally expansive inclinations of prosecutors and with changing mores—such as the desire to affirm the grave criminality of sexual violence<sup>11</sup>—to push the development of the law. Indeed, while at all times formally maintaining that it applies only existing law, the Tribunal and its supporters have also noted, as a point of pride, the ways in which ICL has been shaped, defined, and advanced through the ICTY's jurisprudence.<sup>12</sup> Thus in its very first case, *Tadić*, the Tribunal applied large parts of the

Geneva Conventions that apply only during international conflicts to the warring parties inside Bosnia—a deformatizing move that treated like kinds of violence alike by eliding the division between international and internal conflicts upon which those Conventions had been premised.<sup>13</sup> In later cases, the ICTY expansively defined particular crimes: identifying rape as a crime against humanity for the first time in *Foča*, for example, and enslavement as a crime against humanity in *Kunarac*, whereas in *Kordić & Čerkez* it clarified the responsibility of civilian leaders under command responsibility.<sup>14</sup> This progressive tendency has also, of course, produced a tension with concerns for legality that surfaced most clearly in precisely those cases, such as *Milošević*, that relied on particularly ambitious theories of liability.

### **C. Problems of individual and collective responsibility**

The Tribunal's Statute defines two main forms of liability—two general ways in which specific substantive crimes can be committed. Direct responsibility under Article 7(1) includes actual perpetration of a criminal act, as well as planning, ordering, aiding and abetting, and similar forms of direct involvement.<sup>15</sup> Command responsibility under Article 7(3) includes liability for a commander or superior who fails to prevent or punish a criminal act committed by a subordinate.<sup>16</sup> Milošević was charged under both forms, and this has been common practice in leadership cases at the ICTY.\* Both of these forms speak of individual criminal responsibility, not collective or corporate responsibility of the kind available at Nuremberg,<sup>†</sup> and indeed one of the Tribunal's principal claims and founding mythologies has been that it contributes to reconciliation precisely by individualizing guilt and thus breaking cycles of collective blame.<sup>17</sup>

It is also true, however, that war is a collective enterprise. Although decisions concerning the resort to war and the conduct of war are made by particular human beings, they are rarely made by individuals acting alone, and one of the principal devices of the war-making enterprise is its operation through large bureaucracies and massed forces. Some classic war crimes and acts of sexual violence can be clearly ascribed to single individuals, but certain crimes—such as the shelling and siege of Sarajevo, or the genocide at Srebrenica, both of which were charged



against Milošević—are by their nature highly complex operations. This complexity manifests itself in two discrete challenges: concerning effects on the Tribunal’s theories of liability and, in turn, the broader effects of the Tribunal’s jurisprudence on beliefs about collective responsibility.

***Abstract systems of criminality and JCE:*** Although war is collective and social, the armies that fight wars operate in hierarchies that imply concentration of responsibility at the highest level. The expressly individual focus of criminal liability in the ICTY Statute, combined with the Tribunal’s general mandate to try those most responsible, means that over time, its cases have tended to focus on higher-level leaders. (A large number of indictments were issued against relatively low-level perpetrators under the first Prosecutor, Richard Goldstone, but many of these were withdrawn in 1998 by his successor, Arbour.) This presents the first particular challenge: The atrocities with which the Tribunal is concerned are often of an unmediated and intimate horror, but the individuals whom the Tribunal actually tries are generally distant from the underlying crime base.\* In no case was this more true than *Milošević*, in which, on the Prosecution’s theory, the Accused sat at the very center of a complex web of relationships—and indeed, was the only individual who connected every part of the case to every other—and was linked to the actual crimes through layers of individuals, many of whom themselves were only indirectly linked to those underlying events. As one assessment of the *Milošević* trial notes—in terms that apply to high-level defendants generally—“[p]roving the guilt of a senior official nowhere near the multiple crime scenes and establishing a chain of command in circumstances where no lawful authority existed is very difficult and time-consuming.”<sup>18</sup>

This dual problem of defendants who are distant from the actual violence yet central to the complex network generating that violence has had effects on the ICTY’s theories of liability. The Tribunal’s jurisprudence has expanded the theory of command responsibility to encompass the often informal relationships that defined authority in the conflicts, such as the so-called *vojna linija* (“the military line”) that bypassed the formal chain of command in the JNA.<sup>19</sup> But the ICTY’s principal interpretative novelty has been an expansion of direct responsibility through the theory of joint criminal enterprise, or JCE.<sup>20</sup>



JCE arose out of (or at least is commonly traced to) doctrines first employed at Nuremberg and Tokyo, in cases in which multiple perpetrators worked in concert to achieve a goal that involved criminal acts.<sup>21</sup> The Appeals Chamber in the *Tadić* case had determined that this concept was implicit in the word “commit” in the ICTY Statute.<sup>22</sup> Following *Tadić*, the Prosecution advanced, and various Chambers accepted, the idea that liability for the crimes defined in the statute could be assigned to individuals who joined together in a common plan or purpose that either itself was criminal or encompassed criminal activity, and that each individual in the enterprise could be liable for all the crimes of the others.

There are three types of JCE generally recognized and used in the ICTY’s jurisprudence: type I, in which individuals share an actual, direct criminal intent, such as a murder; type II “systems of ill-treatment,” such as concentration camps; and type III JCE, in which individuals are liable for the “natural and foreseeable consequence of effecting [the] common purpose,” such as ethnically cleansing a region.<sup>23</sup> Type III is the broadest form, contemplating liability for all members of the JCE for any reasonably foreseeable crimes committed by any members, even if some members did not share the requisite mens rea for those crimes.<sup>24</sup> For example, genocide, which is a special intent crime, could be charged against a member of a type III JCE, even if that individual himself did not intend to commit genocide. Milošević was charged with genocide under theories relying on both type I—that he himself possessed a genocidal intent—and type III—that in effect imputed the intent of others to him.\*

Perhaps the most important aspect of JCE, however, is revealed by a misnomer in the term itself, for although JCE refers to a “criminal enterprise,” the enterprise—the common plan—need not itself be criminal, so long as there are crimes even incidentally but foreseeably involved in its realization. For type III, which we might call theater JCE, the common plan can be political in nature. Thus in *Milošević* and several other cases involving the Serb leadership, the heart of the JCE was the creation and maintenance of a Greater Serbia—itself not a crime under the ICTY’s Statute—through acts of ethnic cleansing—which are crimes. The potential for conceptual slippage between the idea that the modalities of the enterprise are criminal, and that the enterprise itself is criminal, is

considerable. It has been observed that theoretically, all the Serb cases at the Tribunal could be joined to the single JCE identified in *Milošević*—logically, all were in fact a part of it.<sup>†</sup> At some point, this becomes indistinguishable from a claim of collective liability. Equally, the flexible nature of JCE claims allows a prosecutor to shape the case to fit by alleging a narrower or more expansive JCE, or even multiple JCEs that cover different aspects of a larger transaction.<sup>‡</sup>

The Tribunal's Statute does not expressly mention JCE, but does impose liability on anyone who "otherwise aided and abetted" the perpetration of a crime,<sup>25</sup> and various Chambers, beginning with *Tadić*, have accepted that this provides a sufficient textual basis.<sup>26</sup> JCE has often been compared to Anglo-American conspiracy law, and the comparison is entirely plausible on both substantive and etymological grounds—an example of the influence of common law concepts and practitioners on the ICTY.\* Such a doctrine obviously enormously expands the reach of the Prosecution and greatly simplifies its task at trial. Depending on one's perspective, JCE allows prosecutors to make overreaching correlative claims without proffering direct evidence and violates principles of legality, or is an example of intelligent hybridization—a tool redesigned to match the complex evidentiary patterns of war, in which acts are rarely committed by single individuals but rather in a complex cooperative context, and paper trails and witnesses are hard to come by.

***Telling an individual story about collective violence:*** The second challenge arising from the complex nature of war concerns the broader effects of the Tribunal's jurisprudence, and relates to the way JCE allows one to characterize the many events of a war as elements in a single criminal process. As we have just seen, JCE makes it easier for prosecutors to show how the many disparate parts of a war are related, which makes the construction of a successful case easier—but this also creates a dangerous temptation to treat a single trial as a proxy for an entire conflict. For, despite the obvious attractions of this technique for those wishing to use the Tribunal to tell the story of the Yugoslav wars—attractions to which the Prosecution evidently succumbed to a degree—the Tribunal's work is premised upon the beneficial influences of individualizing guilt.

That is, implicitly, an empirical claim about the effects of trials and the nature of communal violence, and it is a hard one to prove. But even on its own terms, the claim raises a consequential question: What is the interaction between a legal process focused on individual guilt or innocence and war-making enterprises that exhibit irreducibly collective qualities? The identification of specific individuals who are declared guilty inevitably serves as a kind of shadow exoneration for the many people not tried. This may be useful—scapegoating is a traditional method for communities to work through the complexities of complicity and put difficult and morally ambiguous episodes behind them.<sup>†</sup> But it is also, decidedly, a focus on one set of responsible actors as opposed to others, who have other kinds of responsibility, and the fact that ICL makes an individual focus its *raison d'être* means it necessarily forgoes engaging with those other forms of responsibility. If the Tribunal's theory about the relationship between individual and collective responsibility is not correct, however, the institution's proudest feature would in fact be a basis for its inefficacy and irrelevance in the region.<sup>‡</sup>

In addition, though tools such as JCE aid in the interpretation of complex events, each trial is, by design, of an individual, and the act of constructing a legal narrative about one person's guilt inevitably creates incentives to place more guilt on that person, less on others. This creates tensions within an institution such as the ICTY that must adjudicate several related and overlapping claims. In *Milošević*, the logic of the Prosecution's case placed one man at the center of a vast network, but in the subsequent trials of other members of that network, the Prosecution has responded to the incentives to place others at the center of their own, smaller circuits of criminality, and thus minimized the interconnections between them and even, perhaps, the links to a man, now dead, who is no longer on trial.\*

## **II. Institutional Pathways**

### **A. Structure of the Tribunal**

The ICTY is divided into three main institutions: Chambers, the Office of the Prosecutor, and the Registry. Originally the role of defense counsel



was only minimally defined, but there has been increased attention to this function—in part because of the experience of *Milošević*. Many of the Tribunal's processes are hybrids of common law and civil law procedures, with some that are novel.

**Chambers:**<sup>27</sup> Chambers include the three Trial Chambers and the Appeals Chamber. Each case is heard by a Trial Chamber composed of three judges; since the death of Judge Richard May during the *Milošević* trial, standby judges are now assigned to cases. The Trial Chamber is responsible for the conduct of the trial, issuing decisions and judgments, and determining sentence. Appeals of judgment and sentence, as well as interlocutory appeals during the trial, are heard by the Appeals Chamber, which originally had five judges and now has seven. (The Appeals Chamber also hears appeals from the International Criminal Tribunal for Rwanda, or ICTR; two judges from the ICTR sit on the Appeals Chamber.)

Judges are elected by the General Assembly from a list drawn up by the Security Council. The Statute requires that they be of high moral character and possess the qualifications for the highest judicial office, but says little else about their qualifications; in practice judges have come to the Tribunal with a range of backgrounds, from long experience in municipal criminal law to careers in diplomacy. There is also a pool of *ad litem* judges.

A single judge is responsible for confirming the Prosecutor's indictment; for the initial *Kosovo* indictment, that was Judge David Hunt. At trial, judges have an active role—more than in the traditional common law, and in certain respects closer to that of the civil law judge: Judges may examine witnesses themselves, for example, though they rarely have. The judges also write the Rules of Procedure and Evidence (RPE) for the ICTY. In *Milošević*, the Chamber had a decisive role in determining the length and scope of the trial's phases, limiting the time available and the number of witnesses that could be called.

**The Prosecution:** The Office of the Prosecutor is by far the largest of the three organs of the Tribunal. The Prosecutor is responsible for initiating investigations, bringing indictments, presenting cases, and making appeals. The Prosecutor is appointed by the Security Council on the nomination of the Secretary General. The veto power of the Security Council's permanent members ensures that that this process can be protracted and politicized, as it was, in particular, at the very outset. A

Chief Prosecutor was appointed in October 1993, but stepped down after several months without ever having taken up his office, and no replacement was agreed on until August 1994, when Richard Goldstone of South Africa was appointed. Goldstone issued his first indictments in November 1994; the first trial, *Tadić*, began in 1995, and soon many more followed.<sup>28</sup>

In 1996, Goldstone stepped down, and was replaced by Louise Arbour, a Canadian judge; it was Arbour who presided over the *Kosovo* investigation and indictment. Arbour in turn stepped down in late 1999 and was replaced by Carla Del Ponte, a Swiss former attorney general; Del Ponte oversaw the *Bosnia* and *Croatia* indictments and was Chief Prosecutor during the whole *Milošević* trial. She stepped down in 2007, replaced by Serge Brammertz, a Belgian prosecutor and former Deputy Prosecutor of the ICC. The last new indictments were issued in 2004, and since that time the Prosecution has focused on completing its existing cases, though this has included comprehensive revision of existing indictments in cases such as *Karadžić* and *Mladić*.

While its investigations were still active, the Prosecution had a large number of separate investigative and trial teams. It also has an information and evidence section and several specialized units designed to work outside of this territorial organization, including a Military Analysis Team, a Leadership Research Team composed of specialists on the former Yugoslavia, a Trial Support Unit, and an Appeals Division. The Chief Prosecutor also has an Immediate Office of advisors that also deals with relations with the UN, state cooperation, transfer of cases, and field offices in the former Yugoslavia. (Until 2003, the Prosecutor was also Chief Prosecutor of the ICTR, but that office has since been separated.)

***The Registry:*** The third organ of the Tribunal is the Registry, responsible for the administration of the ICTY. In addition to all the usual and necessary functions that arise with any large bureaucracy, the Registry also administers specialized services particular to the Tribunal's nature as an international court handling cases from a sensitive and violent arena of multi-ethnic conflict. These include: a Victims and Witnesses Support Unit; a Legal Aid unit; a Pro Se office to support self-representing defendants;\* an extensive Translation and Interpretation service that renders proceedings and documents in English, French, Serbo-Croatian, Albanian, and Macedonian; the Detention Unit in Scheveningen, located



within the physical confines of a Dutch prison; and an Outreach Section, formed only after several years and following criticism that the Tribunal was making insufficient effort to explain its work to the populations of the former Yugoslavia.<sup>29</sup>

***Defense:*** The Statute establishing the Tribunal did not envision the defense as an equal organ with the Chambers, Prosecution and Registry, and counsel has been arranged for each Accused separately. Early on, instances of defense attorneys appearing before the Tribunal who were demonstrably unprepared to deal with its mixed but predominantly adversarial system were proverbial; these were generally from the former Yugoslavia and therefore steeped in a civil law tradition in which the role of counsel in the courtroom proceedings is much less active than in the common law.<sup>30</sup> Over time, the defense function has become more defined, professionalized and, to a degree, institutionalized.<sup>31†</sup> An Association of Defense Counsel Practicing before the ICTY was established in September 2002, which is entirely independent of the ICTY, but which is in part a response to the Code of Professional Conduct for Counsel appearing before the Tribunal,<sup>32</sup> promulgated by the Registry, and has become increasingly involved in consultations with the Registry concerning defense practice. Some individual attorneys have become highly specialized in ICL and have defended numerous Accused, but the defense for each Accused remains a highly autonomous enterprise. In his own case, of course, Milošević represented himself, a practice that the Statute allows and that has since been followed by several other defendants, most notably Vojislav Šešelj.<sup>33</sup>

## **B. The general trial process**

***Investigation and indictment:*** At the time the *Milošević* indictments were prepared and during the trial, the Prosecution's investigations and cases were conducted by separate investigation and trial teams that each organized their work along lines corresponding to the ethnic and political divisions in the Yugoslav conflict. Thus one team would work on crimes committed by Croatian Serbs, while another worked on crimes committed by Croatian forces against Serbs. There were obvious advantages to such an arrangement—such as protection of witnesses—but it also introduced rigidities into the decisional structure of the Prosecution that made it more

difficult to ensure a consistent strategy across cases. The initial investigation against Milošević followed this pattern, for example, as one team investigated members of the Serbian and FRY hierarchy for crimes committed against ethnic Albanians in Kosovo.<sup>\*</sup> This model presented complications later, however, as the overarching case against Milošević crossed these organizational lines, implicating investigations in Kosovo, Bosnia, and Croatia.<sup>†</sup>

***The trial phase:*** The ICTY's Statute and the Rules of Procedure and Evidence are hybrids, but early on demonstrated considerable influence from the common law adversarial model, though this has been modified over time by rules borrowed from the civil law.<sup>34</sup> There is no jury—a fact which in some cases has fit oddly with the common-law inflection of some of the Tribunal's rules that arose, in their original Anglo-American context, in order to protect jury members from bias.<sup>‡</sup>

Originally, there were no provisions for plea bargaining at the Tribunal, but the logic of the ICTY's mandate and the Prosecution's strategy to pursue senior leaders and those most responsible for crimes—as well as the influence of the many common law practitioners dominating the institution—led to its introduction.<sup>35</sup>

Evidentiary rules are one area in which civil law norms have proven more dominant; the rules are considerably more relaxed than in the common law tradition, allowing hearsay and extensive witness preparation. In addition, the Prosecution has an obligation to provide an accused with any exculpatory information in its possession. This in part accounts for the enormous amount of documentation that is handed over to defense counsel, though in fact the amount would generally be very large even without any such obligation; cases at the ICTY tend to have enormous documentary records.<sup>36\*</sup>

In 2000, just prior to *Milošević*, Chambers introduced Rule 92*bis*, which allowed for written statements to be submitted in lieu of testimony in person.<sup>37</sup> The purpose of this rule was to streamline the trial process and avoid undue burden on witnesses who had to travel from the former Yugoslavia and often had to remain in The Hague for considerable amounts of time. The effect, however, was also to reduce the time and attention given to live witnesses in court.<sup>†</sup>

***Language:*** The official languages of the Tribunal are English and French, but in practice the operations of the whole institution are in English. Trials are conducted with simultaneous interpretation into relevant languages—when the Tribunal began operation, this invariably meant Serbo-Croatian, but later Albanian and Macedonian were added. *Milošević* required translation between French, English, Albanian, and Serbo-Croatian.

The translation of documents is not only time-consuming but introduces an element of abstraction into the trial process. Simultaneous interpretation necessarily introduces strategic opportunities into the trial process for those who can fluidly deploy a language that other parties—most often the judges and prosecutors—cannot.<sup>‡</sup> Witness statements, in particular, are subject to an extensive process of revision and translation that can distort the sense of the witness' original utterance, even when the translators are highly competent, as those at the Tribunal are.

***Potential consequences:*** Indictees who have been transferred to the ICTY are held on remand in the Detention Unit in Scheveningen. Both the Prosecution and Accused may appeal judgment and sentence—a feature clearly deriving from the civil law tradition—and sentences can be reduced or, less commonly, increased on appeal. Once convicted, individuals are transferred to prison facilities in states that have entered agreements with the ICTY; 17 states, all in Europe, have made such agreements.<sup>38</sup> Those convicted receive credit toward their sentences for the time spent incarcerated at the ICTY; given the length of the process, this has often been a considerable portion of the total sentence. Several convicted individuals have already served their sentences and been released.

***Patterns in the jurisprudence:*** The first trial, of Dušan Tadić, a camp guard in the Prijedor region of Bosnia, began in 1996.<sup>§</sup> Prosecution strategies that were to appear later in *Milošević*, such as the focus on Greater Serbia and on the preparations for the conflict, are already evident in this trial, although its geographic scope is much smaller and Tadić was not a significant actor.<sup>39</sup> By February 2002, when *Milošević* began, the Tribunal had heard 34 cases.<sup>40</sup> The Tribunal has indicted 161 individuals and heard cases involving 126 accused, with the remaining indictments



withdrawn, terminated before trial due to death, or transferred to domestic courts.

The ethnic distribution of indictments has been the source of endemic controversy, reflecting the challenges of converting formal trial processes in The Hague into consequential change in the former Yugoslavia. Far more Serbs were indicted than members of any other community—just over two-thirds of the total—and many Serbs have, in turn, interpreted this as evidence of the Tribunal’s persistent bias against them and its role as an agent of a neo-imperialist West. The Prosecution and its supporters, as well as members of the Bosniak community, have interpreted the numerical imbalance as accurately reflecting the disproportionate share of crimes committed by Serbs.<sup>41\*</sup>

Although the earliest indictments were against low-level figures such as Tadić, a number of the Tribunal’s cases have been against leadership figures—senior military or civilian officials generally charged under both theories of liability, direct and command. Most of the individuals represented in the *Milošević* JCE or otherwise closely linked to Milošević, and who have been tried separately—in the *MOS* trial,<sup>†</sup> *Stanišić & Simatović*, or *Perišić*, for example—fall into this category.<sup>‡</sup> These cases often present similar challenges to those that arose in *Milošević*, such as the need to prove de facto lines of control. However, cases against Bosnian civilian and military leaders such as Karadžić and Mladić rest on claims about lines of authority that are often more straightforward and therefore look, by analogy, more similar to the *Kosovo* indictment against Milošević, in which it was possible to construct claims about formal, de jure responsibility.

Some cases have focused specifically on certain kinds of crimes, such as the *Foča* and *Furundžija* cases, which addressed acts of sexual violence; these have generally involved lower-level indictees. These sorts of crimes are also implicated in leadership cases such as *Milošević*, as they often form part of the underlying crime base that must be proven. For crimes of sexual violence, senior leadership has generally been charged either under theories of command responsibility—as there is little or no evidence of direct orders to engage in such acts, and therefore liability for leaders rests on their failure to punish or prevent—or on a direct theory based on the foreseeability of such acts in the context of a JCE.<sup>§</sup>

**Completion strategy:** The duration of the Tribunal's mandate is not defined in its Statute, and depends upon the Security Council. Even before the *Milošević* trial began, there were initial discussions about how long exactly the Tribunals should operate. In 2003, the Security Council approved completion strategies for the two Tribunals.<sup>42</sup> According to the original strategies—issued while *Milošević* was ongoing\*—investigations were to finish by 2004, trials by 2008, and all work (including appeals) by 2010. The ICTY issued its last indictments in 2004 (charges have been brought subsequently for contempt of court), and in 2011, the last two ICTY fugitives, Mladić and Goran Hadžić, were apprehended. Both Tribunals are currently scheduled to finish their trials by 2014, other than Mladić, Hadžić and Karadžić, which should last until 2016; in any event, appeals for the various cases will certainly take longer.<sup>43</sup> A residual Mechanism for International Criminal Tribunals has been established to handle remaining casework from both Tribunals.<sup>44</sup>

### III. Interactions with States

Because the Tribunal is a creature of the Security Council's Chapter VII powers, states have a clear legal obligation to cooperate with orders of the Chambers and with investigations by the Prosecution. The Prosecutor and the President of the Tribunal report regularly to the Security Council, and have used this forum, as well as informal publicity, to pressure the states of the former Yugoslavia to hand over indictees, provide access to documents, and cooperate with investigations and trials. The Council has only occasionally and inconsistently acted to enforce these obligations, however.<sup>†</sup>

The Tribunal does not have its own enforcement mechanisms, and is practically reliant on outside actors to ensure compliance with its processes.<sup>45</sup> Serbia and Croatia in particular were, for a considerable period of time able to resist or shape the Prosecution's and Tribunal's demands for information and access.<sup>46</sup> The controversy over the VSO documents, discussed in [Chapter 1](#), is a principal example of how Serbia was able to slow and restrict the release of information to the Tribunal, minimizing the potential damage to Serbia from revelations about its role



in the conflict, in ways that also damaged the public image of the Tribunal.

At various points the Tribunal has had powerful if fickle allies in the major Western powers. Although states such as Britain and France were formally strong supporters of the Tribunal, they were not in fact enthusiastic about its effective operation in its early stages, as they were concerned it might interfere with peace negotiations. During the period immediately after the Dayton Accords, NATO forces in Bosnia pointedly resisted efforts to apprehend indictees.<sup>47</sup> Early efforts to arrest some of the leading Bosnian Serb indictees were either aborted because of leaked information or were thought to be more show than serious. Beginning with the arrest of Goran Jelisić in January 1998, however, this policy shifted, and NATO became a relatively reliable supplier of indictees.

During and after the Kosovo conflict, NATO states dramatically increased their support of the Prosecution.<sup>\*</sup> In addition, the EU accession process has become entangled with cooperation with the ICTY, with Serbia's progress through the stages of association and candidacy sometimes held up by demands that it demonstrate greater cooperation with the Tribunal—a process that gave the Prosecutor at least some influence over the pace of the process, and therefore indirect leverage over Serbia. The apprehension of Karadžić in 2008 and then Mladić and Hadžić in 2011 were generally thought to have been the product of pressure from the EU, and especially the Netherlands.<sup>48</sup> In 2013, following a series of controversial acquittals of military and police leaders, a letter from the Danish Judge Harhoff was leaked to the press, in which he suggested that Judge Meron, the Tribunal President and an American citizen as well as formerly Israeli diplomat, had been influenced by US and Israeli military officials, and in turn had pressured other judges to acquit senior military figures.<sup>49</sup>

## **IV. A Shrinking Space: The Tribunal's Legacy for Law and Reconciliation**

The Tribunal began its operations in 1994; it will likely reduce the scale and alter the mode of its operations in 2014 and close a few years after that, though the power of institutions to persist ought never be underestimated. Twenty years is a considerable time, and it should be possible to make a preliminary estimate of the Tribunal's effects and influence.

The ICTY itself lists its achievements in five categories: holding leaders accountable; bringing justice to victims; giving victims a voice; establishing the facts; developing international law; and strengthening the rule of law.<sup>50</sup> In general, the Tribunal has consistently pointed to its own jurisprudence as one of its strongest legacies—the clarification and advancement of a corpus of criminal law that has served as a model for other international tribunals and for domestic war crimes courts and that has contributed to the entrenchment of the rule of law.<sup>51†</sup>

The Tribunal's legacy in law is unquestionable: The modern, flourishing field of ICL has been created and defined at the ICTY and ICTR, and of the two, the Yugoslav Tribunal—for reasons of its prior creation, its greater resources and patronage, its more efficient operation, and its centrality to Euro-Atlanticist agendas—has generally been the more influential. The structure, processes, and style of modern ICL institutions are all derived from the Tribunals' experiences. The obvious problem with this strong focus on institutional achievements, of course, is that they are surely not valuable in and of themselves, but only if they contribute, directly or indirectly, to broader effects, such as peace, stability, or justice, broadly considered.

Indeed, one of the principal claims originally made for the Tribunal was that it would have real influence on the shape of the conflict and post-conflict reconciliation in the former Yugoslavia. Yet it is enormously difficult to say with any confidence what the influence of the Tribunal has been. Those who do say with confidence that the Tribunal has had an impact in the region rarely have clear proofs of their claims; equally, skeptics, whose numbers have grown considerably since the promising days of the Tribunal's establishment, cannot say with certainty that it has done nothing or has done harm.

On deterrence, for example, it is possible to say that the Tribunal has failed, since during the period when its operations were getting into full

swing, wars broke out in Kosovo and Macedonia. Conversely, for some, Kosovo is a proof of the continued theoretical viability of deterrence, as it was perhaps the demonstrable weakness of support for the Tribunal—and the Tribunal’s failure to indict Milošević—that persuaded him he could act with impunity.\*

We need not insist on total certainty in order to say something about influences. We can note, for example, that claims about the Tribunal’s effects are now quite modest by both relative and objective measures: They are considerably more modest than those originally projected in the early 1990s, and they are, quite simply, modest on their own terms. Two recent studies show this point: one, focused on Serbia, finds only thin evidence of positive effects on the attitudes of the local population—that ICL “shrink[s] the space for denial.”<sup>52</sup> The other, focused on Bosnia, finds that the Tribunal has shaped conversations or provided a forum for debates, but little in the way of actual changes in attitude.<sup>53</sup>

And we may be fairly certain of some things the ICTY has not done: Even defenders of the Tribunal—including the Tribunal itself—have conceded that it has not yet produced demonstrable reconciliation in the region.<sup>54</sup> Arguments that ICL deters conflict and crime are considerably rarer than they were when deterrence in the former Yugoslavia was still entirely prospective; the field has shifted toward expressive theories of law that do not posit a direct causal relationship between trials and behavior, and although in part this reflects changing attitudes toward ICL’s teleology, it also suggests an encounter with the imperfectly understood but palpable empirical challenge of what has happened in the region—and what has not—since the Tribunal’s formation.<sup>55</sup>

Finally, many of the claims for the Tribunal’s effects are conjectural and unfalsifiable, anticipating future benefits that either will or will not materialize. A future is sometimes claimed by gesturing back toward Nuremberg,<sup>56</sup> noting how its effects on Germans’ perceptions of their history and collective responsibility were hardly visible until a generation later, or indeed lay entirely dormant until the 1968 upheavals produced the right conditions for a conversation, and the records and documents of the IMT were there, ready to be deployed.<sup>57</sup> As the Tribunal is now 20 years old, it is getting near the age Nuremberg was when, perhaps, it began to have a measurable effect; it should therefore now be possible to ask

similar, even more searching questions about the Tribunal's effects. This book is, in part, an attempt to do just that.



## 3

# The Man on Trial

Slobodan Milošević

One of the core justifications for modern ICL is its focus on individuals—its assignment of individual criminal responsibility, rather than statist or collectivist attribution. The effects of this orientation are contested, and even the coherence of the Tribunal’s commitment to this model may be challenged—when one considers some of the implications of JCE discussed in [Chapter 2](#), for example—but it is unquestionably the conceptual and procedural core of the modern ICL project and its rhetorical focus. In considering the *Milošević* trial—the signal trial of the most influential court in the new era of ICL—we are therefore also, inevitably, concerned with an individual whose guilt or innocence was the notional purpose of the whole affair.

Yet we are also concerned with an individual whose extraordinarily prominent role in the collapse of Yugoslavia meant that, in his trial, the Tribunal’s concern with the broader context of its mandate—with the collapse of Yugoslavia, the violence that ensued and the possibility of reconciliation—was not merely general, but an essential element in the foreground. Many of the Tribunal’s defendants rose to notoriety only during the wars, but Slobodan Milošević was already an established political leader, one of the pivotal players in the crisis, and even before the Tribunal was founded he and his regime were the focus of war crimes accusations.<sup>1</sup> Milošević rose to prominence in the 1980s amid the economic crisis, rising nationalist sentiment, and political paralysis that

were the preparatory ground for the killing that was to come,<sup>2</sup> and for many, it was practically impossible—and undesirable—to evaluate his legal responsibility in isolation from his role in the whole process of Yugoslavia's destruction.\*

Milošević was born on 20 August 1941 in Požarevac—territory under German occupation at the time, but before and after that a part of Serbia. He met his future wife, Mirjana Marković, while still in high school, and they married in 1965. By all accounts they were genuinely and thoroughly attached to each other—later on, when Milošević was a prominent party official and executive, he was never known to partake of the common practice of maintaining mistresses, and indeed in general his tastes did not run toward Titoist extravagance and excess. It is also true that the relationship was a positive benefit to Milošević politically, as Mira's family had solid (if not unblemished) Partisan credentials and considerable entrée in the new Yugoslavia. Marković became an important political actor in her own right during his years at the center of power, when she ran her own party, *Jugoslovenska levica* (Yugoslav Left or JUL). The couple had two children, Marija and Marko.

In 1960, Milošević began law school at the University of Belgrade—an indication of his entry into the leading, and ruling, establishment—and while there became a close friend of Ivan Stambolić, who would later become a senior party official, Milošević's mentor, and his *kum*, a particularly close social bond. Milošević was active in party politics while at law school. Reportedly the suggestion for the new name of the country—Socialist Federal Republic of Yugoslavia—originated with Milošević when he took part in a debate on the subject; the subtlety, refinement or—from a different perspective—narrowness of the intervention he made might be seen as a precursor of both Milošević's attention to detail and his ambiguous position between competing visions for the country. At the time, of course, none of that could be visible in what was simply an artful suggestion.<sup>3</sup>

While he was still in law school, his father, Svetozar, committed suicide; his mother, Stanislava Resanović Milošević, did the same a decade later. These two events gave rise, later, to much speculation—one might even say anticipation—in the press that Milošević himself would end the same way. But the effect on his sense of self, his worldview, and

his politics is unclear, as is so much about the inner life of this consummately closed and private man.

After graduating in 1964, he became an economic advisor to the mayor of Belgrade. Thereafter he moved through a series of commercial and governance positions of increasing authority, in a progress that was utterly conventional if also, unquestionably, unusually successful. In 1968 he began working at the state-owned company Tehnogas, and was appointed its chairman in 1973. In 1978, he became the director of Beobanka, and his banking work took him to New York, contributing, among other things, to his considerable fluency in English and his familiarity with Americans.

By 1984, Milošević was head of the Belgrade branch of the Serbian Communist Party, a powerful, important, and rising member of the establishment—but also not yet marked as someone likely to break from the set path, as he soon did, and seize the opportunity that the country's increasing drift into crisis presented. One leading general of the Titoist era even described Milošević as “committed to our struggle against nationalism and [he] will oppose the liberals in Belgrade.”<sup>4</sup> Yet he was also “the first Yugoslav politician to realize that Tito was dead[.]”<sup>5</sup> Depending on one's view, Milošević was the political beneficiary of the country's crisis, its principal instigator, or both.<sup>6</sup>

On 28 May 1986, he was elected president of the League of Communists of Serbia. It is around this time that the arc of Milošević's life becomes more controversial, precisely because it became more consequential for the crisis. The event and the opportunity that has come to be seen as the defining moment in Milošević's ascent came in April 1987, when he was sent by Stambolić (who was then president of Serbia) to Kosovo to meet with disaffected local Serbs. His first meetings were without incident, but he returned to Kosovo four days later. Coming out of a meeting with provincial officials, Milošević addressed a restive crowd of Serbs complaining of abuse from local Albanian police—a crowd whose presence was either a surprise to him or part of a plan that he had arranged—and uttered a sentence, conveniently caught on film and repeatedly rebroadcast, that would mark him as the enfant terrible of the late Yugoslav period: “No one should dare to beat you again!”<sup>7</sup> The “you,” it was understood, meant the Serbs.



Thereafter, Milošević's ascent became as unconventional, in terms of the still-dominant political culture, as it was rapid. Armed with the instruments of the Yugoslav patronage system and with allies in the media,<sup>8</sup> in September 1987, at the Eighth Session of the League of Communists of Serbia, Milošević engineered the defeat of his mentor Stambolić. In February the following year, Stambolić resigned, and shortly thereafter Milošević succeeded him as president of the Presidency of SR Serbia.<sup>9</sup>

During late 1988 and early 1989, Milošević orchestrated the so-called antibureaucratic revolutions, resulting in the election of his loyalists who took control of Vojvodina, Montenegro, and Kosovo; this, together with Serbia, gave Milošević effective control of half of the seats on the federal Presidency. On 26 December 1990, he was elected president of the reconstituted Republic of Serbia. His new party, the SPS, appealed to both nationalist and socialist-Yugoslavist tendencies in the Serbian electorate.

Milošević's dominance within a rapidly transforming Serbian political scene was perfected and mythically reaffirmed with his speech at the mass rally marking the 600th anniversary of the Battle of Kosovo Polje, on *Vidovdan*, 28 June 1989.<sup>10</sup> Years later, this day became important to the Prosecution case, which saw in the speech early indications of the violent means by which a plan for Greater Serbia would be realized. Milošević spoke in martial if elliptical terms about the possibility of new armed battles, but the same speech was also included turgid recapitulations of orthodox Yugoslav socialist positions.<sup>11</sup>

The idea that Milošević's ascent was the apotheosis of Serbian nationalism *simpliciter* is an incomplete accounting. Although increasingly allied with rising nationalist forces in Serbia, Milošević was also perceived as a defender of Yugoslavia and as an economic liberal and reformer; for example, he headed the Serbian Reform Commission formed in January 1988, which aimed to introduce economic reforms. Milošević's rhetoric and politics represented both an embrace of a centralizing Serbian nationalism—in a way that was incompatible with the main lines of the late Yugoslav project—and a reaffirmation of social, economic, and political themes that would have been immediately recognizable to anyone who had grown up in socialist, Titoist Yugoslavia.<sup>12</sup> In a sense, that was precisely the locus of his effectiveness and power: Milošević created a



coalition of nationalists and Yugoslavists, which at a critical juncture allowed him to act with extraordinary fluidity in the rapidly liquefying politics of the dying regime—a quality that has been described as consummate “post-Titoist ambiguity: the ability to exploit rising nationalism within the framework of Titoist orthodoxy.”<sup>13\*</sup>

Thus Milošević was able to appear and be sufficiently committed to the survival of Yugoslavia to have currency with a still Yugoslavist JNA until it was itself fully converted to Serbian nationalism, and he was able to do much the same with a Serb populace whose own incipient nationalism was, for a time, plausibly indistinguishable from a defense of Yugoslavism and its premises. Whether Milošević himself ever actually held meaningful nationalist views, even after he publicly embraced Serbian nationalism, is hardly clear; political opportunism seems his most dominant quality.<sup>14</sup>

By the time Slovenia withdrew from Yugoslavia in mid-1991 and as violence escalated in Croatia, Milošević was president of Serbia, the dominant figure in the federal structure—the single most powerful actor in Yugoslavia—and a recognized leader of Serbs throughout the country. As the most powerful figure in the remainder of Yugoslavia, Milošević had considerable military and political resources at his disposal to intervene in these conflicts, and his influence was widely acknowledged.<sup>15</sup> With that acknowledgement came recognition of the theoretical consequences of influence: Throughout the 1990s, there were calls for his prosecution.<sup>16</sup>

Milošević was actively involved in various peace negotiations during the Croatian and Bosnian wars, just as minutes of the VSO show he closely discussed the FRY’s role in the wars in neighboring Bosnia and Croatia. Although he had no de jure relationship to the Croatian or Bosnian Serbs, he regularly took a hand in their affairs, on occasion even acting on their behalf.\* For example, Milošević signed the 15 October 1991 ceasefire between Croatia and Croatian Serbs.<sup>17</sup> By the latter stages of the Bosnian war, Milošević was seen as an essential actor; the United States adopted a so-called Milošević strategy, prioritizing its relations with him as the key interlocutor for Serbs going into the Dayton negotiations.† Later, of course, when he was on trial, these same negotiations throughout the wars were raised as evidence of his influence.

In December 1992, Milošević was reelected as president of Serbia within the new FRY. Over the following years, the genuine popularity and broad political support Milošević had enjoyed during his rise to power began to fray, and his party's margins thinned.<sup>‡</sup> He remained, however, a genuinely popular politician and nationalist icon for a sizable segment of the population, and his control of the FRY and Serbia's institutions was unchallenged for several years.<sup>18</sup>

In Winter 1996–97, Milošević's regime was the target of mass demonstrations in Belgrade following elections. But despite months of determined and creative public resistance, the demonstrations eventually faded and Milošević emerged secure in his position, with his control of the institutional levers of power undiminished. In July 1997, Milošević switched jobs, becoming president of the FRY; with that position he also became president of the VSO and Supreme Commander of the VJ—placing him, for the first time, in a clear de jure line of control over military forces.

Milošević maintained his grip on power during and after the Kosovo conflict—the Tribunal's indictment notwithstanding—but in 2000, he made what, in retrospect, appears as a tactical error, arranging for the position of FRY president to be popularly elected, rather than elected by Parliament as in the past. The opposition forces rallied around a single candidate, Vojislav Koštunica, and successfully contested the elections. Milošević was forced to concede defeat, resigning on 6 October.

At first Milošević was allowed to remain in Serbia, holed up in the presidential villa in the Belgrade district of Dedinje. After several months, however, he was arrested on 1 April 2001, in a tense standoff with Serbian security forces. On 28 June 2001—the anniversary of his political apotheosis at Kosovo Polje, as it happened—in a secretive operation undertaken by Serbia, Milošević was transferred to the ICTY in The Hague.<sup>19\*</sup>

Milošević first appeared in court at a hearing widely covered in the world media. The actual trial began on 12 February 2002. Milošević announced his intention to represent himself, which meant he was more, and more publicly, active in the trial than a represented defendant normally would be—and, indeed, during his trial he was more visible in the media than he had been when in office. His popularity—which had

sunk to an extremely low level following his ouster—rose again during the trial, as he undertook an overtly political defense of the Serbian nation and demonstrated considerable skill in dominating the trial process; still, he remained an unpopular figure with most Serbs.<sup>20</sup>

Milošević's health declined during the trial, and he was often ill, necessitating drastic reductions in the schedule of hearings. Milošević died on 11 March 2006, in his cell in Scheveningen. A report commissioned by the Tribunal and prepared by one of its judges found that he had died of a heart attack.<sup>21</sup>

Milošević's body was returned to Serbia and, after a memorial ceremony in Belgrade, was buried in Požarevac. His political legacy is a mixed one. For a time, elements of his regime remained in place, but his party, the SPS, declined precipitously after his fall from power, polling in the single digits in the next election. Milošević remained on the party list through 2003, but his ability to control the party from jail in the Netherlands was limited, and his loyalists were soon outmaneuvered. Yet the political policies put in place during his rule arguably continue to define broad swaths of the Serbian landscape; and the policies—political, military, and criminal—that he is thought to have animated throughout a dying Yugoslavia, and for which he was tried, have assuredly continued to dominate the concepts and politics of its successors.<sup>†</sup>

## 4

# The Trial

IT-02-54, *Prosecutor v. Milošević*<sup>1</sup>

Violent impetus, institutional forum, and individual focus all converged in a single trial. *Prosecutor v. Slobodan Milošević* was an enormous, magisterial event, both promising and demanding much, and in the end producing something quite different and quite ambiguous. It is that very ambiguity—matched to the hopes and expectations that surrounded the enterprise, and reflecting the conflicting passions that arose from the conflicts that had engendered both trial and Tribunal—which makes the *Milošević* trial so noteworthy and so worthy of close study now. Rather than a chronology of the trial, we consider here some of the major challenges and controversies that arose during its various phases, from indictment through termination.

## I. The Path to Trial

The acts and events for which Milošević was eventually indicted span most of the Yugoslav conflict, from 1991 to 1999. This time frame also highlights an important initial controversy, which predates the actual legal process against Milošević: Why did that process not begin earlier? During this period Milošević held several of the most senior positions in Serbia and the FRY, and was generally acknowledged to be the dominant political



actor among Serbs, with tremendous influence in the whole region. The Tribunal clearly had jurisdiction over Milošević, and there had been various calls for him to be indicted even during the Bosnian and Croatian conflicts.<sup>2</sup>

Equally, however, there were actors who viewed Milošević as an invaluable—or at least unavoidable interlocutor—in efforts to control or end the wars, and there were frequent, almost endemic rumors of deals to protect Milošević and other senior Serbian officials (and leaders of other warring parties, for that matter) from prosecution. The principals who supposedly offered such deals—U.S. envoy Richard Holbrooke, for example—consistently denied making any offers, even of an implicit nature, and no concrete evidence has surfaced of any such deal. (There are credible reports of such a deal between Holbrooke and Karadžić.<sup>\*</sup>)

Nor was it clear that an indictment would be easy to sustain. Although reports of Milošević's involvement and control over events in Yugoslavia the region was proverbial, they were, for the same reason, rarely of the nature needed to prove his control in a legally orthodox manner; adequate proof would require considerably more than the felt sense of popular opinion or the undocumented claims typical in the elliptical and partisan journalism of the region. The newly established Tribunal—already embarked on a course of low-level indictments—may not have had the means or the confidence to bring such a major indictment without the resources and support of the Western powers.<sup>\*</sup>

Beyond this, there was the bare political fact of Milošević's position and power—he was the sitting president of the FRY, and although that office presented no formal barrier to the ICTY's jurisdiction, it did present considerable obstacles to actually enforcing that jurisdiction: No indictment was going to be efficacious in the short term. (This was arguably also true, though to a lesser degree, of Radovan Karadžić, who was indicted in 1995.) Later, this same logic acted to slow the Prosecution's efforts to expand the initial *Kosovo* indictment to cover Bosnia and Croatia—production of those indictments would be labor-intensive, work which would be for uncertain gain so long as Milošević was secure in Belgrade.<sup>†</sup>

Whatever their earlier reticence, the attitude of the major powers changed considerably in the late 1990s. Milošević's role as interlocutor

and guarantor of peace became less critical after NATO's control in Bosnia was consolidated and a final peace in Croatia secured; new foreign policy leaders in the United States and United Kingdom, in particular, were more committed to forceful intervention in the Balkans. As the Kosovo conflict deepened, there was no other actor with whom Milošević might usefully intervene to secure peace, because his regime was directly involved.<sup>‡</sup>

So, although there is no evidence of active obstruction by the United States or other major Western powers during the Bosnian and Croatian conflicts, there is evidence showing that their active support for investigation of Milošević increased dramatically as the Kosovo crisis deepened, and this alone may have made an indictment more possible.

### **A. The Indictment**

Milošević was eventually indicted on 22 May 1999 for crimes in Kosovo, while that conflict was still ongoing, in an exercise that Arbour referred to as “justice in real time.”<sup>3</sup> This was in a sense ambiguous—on the one hand, it suggested rapidity, as the indictment was completed in only about two months; on the other, it suggested, accurately, that little work had been done prior to the NATO campaign, and highlighted the long period of time that had elapsed since the wars in Croatia and Bosnia without an indictment.\*

Four other senior members of the Serbian and FRY leadership representing important branches of the war effort in Kosovo were indicted along with Milošević: Dragoljub Ojdanić (chief of staff of the VJ), Nikola Šainović (federal deputy prime minister and special envoy for Kosovo), Vljeko Stojiljković (federal Minister of the Interior), and Milan Milutinović (president of Serbia, member of the VSO).<sup>4</sup>

The initial effect of the indictment is unclear. Fears that it might harden the regime's resistance and make a peace deal harder did not materialize, as the Kumanovo Agreement ending the conflict was signed only weeks later.<sup>5</sup> Equally, however, there is no persuasive evidence that the indictment accelerated the conclusion of peace: The decisive components appear to have been Serbia's increasing diplomatic isolation—including signals from Russia that its support was at an end, the failure of Milošević's strategy to divide NATO, and the rising possibility of NATO intervention with ground forces.

Amazingly, the loss of Kosovo—and the indictment—did not immediately threaten Milošević's hold on power. However, shortly after these events, the political opposition began to organize more effectively, and elements of it received considerably increased support from the United States and other actors, now implacably determined to see the end of Milošević's regime.<sup>6</sup> It is practically impossible to separate out the effects of the outcome of the war from those, if any, of the indictment.

For Serbia, the question of how to dispose of Milošević once he was out of power was almost paralytically difficult.<sup>†</sup> Elements of the former regime remained well entrenched, and the former opposition, now in power, was itself of varied opinions. Once Milošević was taken into custody, officials considered charging him with crimes under FRY and Serbian law, including financial crimes—but not any crimes related to the wars in Croatia, Bosnia, or Kosovo. The decision to transfer Milošević to the Tribunal was divisive and controversial, with the new Serbian Prime Minister Đinđić generally in favor and the new FRY President Koštunica strongly opposed. External pressure to transfer Milošević was intense, with clear indications that a planned donor conference would be held up if he were not in The Hague. Ultimately, on the literal eve of that conference, the decision to transfer Milošević to the Tribunal was taken by the Serbian government under Đinđić, a move of dubious formal legality, as transfer—really, extradition—was in all likelihood a federal competence, and therefore under the authority of the FRY government.<sup>‡</sup> (Đinđić had also signed undated documents that appear to pledge not to transfer Milošević,<sup>7</sup> though what their formal value was or should have been is hardly clear. In any case, it is fairly clear that the Tribunal would not have been constrained by them.)

## **B. Pretrial—Initial Appearance, Expanded Indictment, and Joinder**

An amended *Kosovo* indictment was submitted and approved on 29 June—the day of his transfer from Serbia, meaning it had been in the works for some time—and this was the basis for Milošević's initial appearance on 3 July 2001. The hearing was the scene of considerable media attention, which was perhaps mismatched to the narrow technical purposes it formally served. Still, certain elements that were to prove defining of the



trial as a whole became apparent from the outset: Milošević struck a belligerent posture, refusing representation and refusing to enter a plea to the *Kosovo* indictment, a position he maintained in subsequent appearances in October for the *Croatia* indictment and in December for *Bosnia*. He rejected the authority of the Tribunal: “I consider this Tribunal a false Tribunal and the indictment a false indictment I have no need to appoint counsel to illegal [sic] organ.”<sup>8</sup>

Milošević criticized the establishment of the Tribunal as an illegal act, maintaining that the Security Council did not have the authority to create a criminal court, which, he said, should have been established through the General Assembly. These or similar arguments had already been examined in *Tadić*, and whatever their merits were no more successful here; the Trial Chamber rejected Milošević’s challenge in November, paving the way for trial to begin.<sup>9</sup> Still, this firmly established Milošević’s rejectionist posture toward the proceedings and the institution.\*

In October 2001, Milošević was indicted for crimes in Croatia, and then, in December, for Bosnia; work on these indictments had only begun in earnest in mid-to-late 2000 when it became clear Milošević might lose power.<sup>†</sup> Shortly before trial began, at the Prosecution’s request, the three indictments were joined, an ambitious strategy that took three cases—each sweeping in scope—and made them into one single, enormous trial.\* In all, Milošević was charged with 66 counts of war crimes, crimes against humanity, and, for Bosnia, genocide;<sup>10</sup> underlying these counts, were thousands of individual allegations.<sup>11</sup> Milošević was charged on theories of direct and command responsibility.<sup>12</sup>

## II. Approaching Their Task in the Light of History —The Trial Itself<sup>13</sup>

### A. Opening Moves

The trial proper began on 12 February 2002.§ Initial interest in the trial was intense, with the viewing gallery and an overflow press room full and major news media parked in front of the Tribunal.\* Several broadcast



stations in the former Yugoslavia transmitted the entire proceedings live<sup>†</sup> for several days.<sup>‡</sup>

The presiding judge was Richard May, an English jurist; the other two judges were Patrick Robinson of Jamaica and O-Gon Kwon of South Korea. The Prosecution was represented, on that day, by the Chief Prosecutor, Carla Del Ponte, although principal responsibility for the trial lay with Geoffrey Nice, a prominent British barrister and Queen's Counsel. The individual phases of the trial were to be handled by three separate prosecutors: Dirk Ryneveld for *Kosovo*, Dermot Groome for *Bosnia*, and Hildegard Uertz-Retzlaff for *Croatia*. Awkwardly, given Milošević's chosen line of defense, all four principal prosecutors on the case were from NATO countries.

Milošević represented himself, as he had insisted. However, concerned about the risks and burdens of self-representation, in September 2001 the Chamber had appointed three *Amici Curiae*:<sup>§</sup> Michail Wladimiroff, Branislav Tapušković, and Steven Kay. After Wladimiroff was dismissed in October 2002 for making prejudicial comments about the case,<sup>14</sup> Timothy McCormack was assigned for the remainder of the proceedings. Tapušković served until the end of the Prosecution phase; in June 2003, Gillian Higgins was also appointed. The *Amici* were officers of the court; they were expressly not defense counsel, although clearly their purpose was, in part, to compensate for the lack of counsel, backstopping the construction of a valid defense—and implicitly, therefore, also the legitimacy of the proceedings—and specifically to “assist the Trial Chamber”<sup>15</sup> by:

(a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial....<sup>16</sup>

Milošević also had recognized Legal Associates, authorized to communicate with him and having certain privileges associated with counsel, although they did not appear in front of the Tribunal. The first associates were Ramsey Clark and John Livingston, who served from November 2001 to April 2002, at which time Zdenko Tomanović and

Dragoslav Ognjanović, both Serbian lawyers, took over, joined by Branko Rakić in October 2003.

One of the key tensions in the Prosecution strategy—something we have already seen in the Tribunal’s work more generally, in [Chapter 2](#)—was evident in Del Ponte and Nice’s opening statements: The case necessarily focused on one individual, but at the same time the Prosecution was very cognizant of the broader importance of the trial, and, equally, of the implications of its own chosen theory, which was going to require the prosecutors to locate Milošević’s actions in a historical and political context. Del Ponte repeatedly stressed the trial’s exclusive concern with Milošević’s guilt or innocence and rejected any suggestion of collective guilt<sup>17</sup>—a point she made in part by quoting the Chairman of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, from 1914.<sup>18</sup> But, she acknowledged the historical aspects of the trial—not merely its historical importance, but its relationship to the contested history of Yugoslavia:

The history of the disintegration of the former Yugoslavia and the fratricidal conflicts of another age which it brought about is a complex process which must be written by many people. This Tribunal will write only one chapter, the most bloody one, the most heartbreaking one as well; the chapter of individual responsibility of the perpetrators of serious violations of international humanitarian law. It is up to other courts to make the moral, historical, or even psychological diagnosis of the accused and to analyse the social, economic, and political dynamic which constituted the basic fabric of the crimes that we are going to consider. The apparently inevitable concatenation of fear and hatred, political manipulation, the sinister role of some of the media but also the heroism of the resistance and those who opposed him [Milošević] throughout the former Yugoslavia, the survival of dignity and civil spirit and humanity, all of these are mechanisms which must be analysed, dissected, and explained because it is imperative to respond to the victims’ demand for truth, “victims” in the broadest sense of that term, and to reduce the risks of seeing this played out again in another place in the world and, in particular, in the Balkans. But here, more modestly, it is Slobodan Milosevic’s personal responsibility which the Prosecution intends to demonstrate for the crimes ascribed to him, nothing but that, but all of that.<sup>19</sup>

“Nothing but that, but all of that” proved a kind of self-deceptive modesty about what the trial entailed, and what the Prosecution’s own strategy—including its reliance on a “monumental history”<sup>20</sup> of the conflict—required. The disavowal of a historical component to the trial—the rhetorical reassertion that it was only writing one chapter about individual

responsibility—rests uneasily with the unavoidably ambitious program of analysis, and of consequential social change, adumbrated in Del Ponte’s speech. It was an ambition the Prosecution would find difficult to put aside—and one that Milošević’s own strategy made almost impossible to abandon.

Nice’s opening statement discussed Milošević’s rise to power, locating it, as we have seen in [Chapters 1 and 3](#), in the decentralization of power following the 1974 SFRY Constitution.<sup>21</sup> Choosing 1974 as a starting point may have seemed like a judiciously narrow approach to history and context, in comparison with Milošević’s expansive historical reading, but it too implicated deeply contested histories and threatened to distract from the forensic core of the Prosecution’s case. Thus Nice opined on what the phrase “weak Serbia, strong Yugoslavia” meant to Serb nationalist opinion,<sup>22</sup> and showed video footage of Milošević’s meetings and speeches in Kosovo in the 1980s.<sup>23</sup> For the Prosecution, these events were early indications of intentionality and a will to violence in the name of Greater Serbia, but they were also, and inevitably, claims about the course and causes of Yugoslavia’s dissolution.

When it came to Milošević’s victims, Del Ponte and Nice’s principal rhetorical focus was on the Croats, Bosniaks, and Albanians, but each also directed appeals to the Serb population, describing them too as victims of Milošević. From a certain perspective, this was entirely plausible, and indeed Milošević’s popularity among Serbs had fallen precipitously over the decade of war.\* Still, the idea that the two hundred thousand Krajina Serbs displaced by Operation Storm would consider themselves principally victims of Milošević, rather than of the Croatian forces before whom they had fled, was, on perhaps understandable psychological grounds, implausible. Similarly, that a barrister from the United Kingdom—one of the principal belligerents in the bombing of Serbia—would describe the KLA as Milošević’s creation, and the war which NATO had waged as Milošević’s choice, reflected a radical miscalculation of Serbs’ self-image.<sup>24</sup> It is generally acknowledged that the appeal to Serbs was totally ineffective—on the contrary, support for Milošević among Serbs actually increased in the early days of the trial.<sup>25</sup>

More important for our purposes, it reflected a radical misunderstanding of the broader purposes and likely effects of the trial.



An appeal to Serbs in this form—however plausible an historical reading it may have been—implied a belief that this case was and should be about much more than the core forensic purpose the Prosecution itself proclaimed. After all, the appeal truly was rhetorical—none of the 66 counts actually spoke of crimes against Serbs. The Prosecution proclaimed that it was trying a single man, and nothing but that; yet it saw the potential for the trial to be about something more, and it did not hesitate, but seized that chance.<sup>†</sup>

In a sense—and although it spoke first—the Prosecution was anticipating and responding to a strategy that the Accused had already articulated. In his opening statement, which lasted for two days, Milošević elaborated on the themes he had announced in his pretrial appearances. He reiterated his objections to the legality of the Tribunal—an example of his tendency or tactic, seen throughout the trial, to return to issues that, formally and legally, had been resolved. He declared that the trial was asserting the collective responsibility of Serbia and the Serbian nation—a doctrinally untenable position, given the Tribunal’s mandate, but one consonant with widely held views both among Serbs and outside observers critical of Serbia’s role in the wars—and that his role therefore was to defend, not merely himself, but the whole nation:

Over the past two days, all the Prosecutors that we have heard here have uttered one particular sentence; that is to say that they are just trying an individual....But in all the indictments, they are accusing the whole nation, beginning with the Serb intelligentsia. They have accused the Serbian intelligentsia, led by the Serbian Academy of Arts and Sciences...

They are accusing St. Vidovdan [sic] and the battle of Kosovo Polje....

[T]his show which is supposed to take place under the guise of a trial is actually a crime against a sovereign state, against the Serb people, against me.<sup>26</sup>

Part of that defense was to focus on NATO’s bombing campaign, and Milošević spent hours recounting the damages wrought and painting Serb behavior as defensive. The formal legal relevance of this was questionable, but this was not the point. In his opening, as throughout, Milošević framed the trial in expressly political and historical terms. The Prosecution and Chamber largely acquiesced in this strategy—the Prosecution in part because it too had a broader agenda, and because (as we will shortly see) its formal strategy required it to view the wars as of a



piece, and the Chamber out of concerns to give a self-represented Accused full scope to develop the case he wished—but by doing so, they allowed Milošević to set the terms of contestation.

And with that, the trial began.

## **B. The Prosecution phase**

The Prosecution proceeded through its case in three parts, beginning with *Kosovo*, which lasted until the end of September 2002; then *Croatia* and then *Bosnia*, which ran until the Prosecution rested in February 2004—a total of two years.

*The Scope of the Charges:*<sup>27</sup> The charges against Milošević presented certain particular challenges. At the most basic level, the core challenge that confronted the Prosecution was the sheer enormity and complexity of the case they had undertaken: 66 counts, composed of hundreds of specific allegations; hundreds of proposed witnesses; all spanning three separate conflicts—for each of which background information had to be filled in and often contested. In addition, the Prosecution had advanced multiple theories of liability, which meant it would have to explain the application of each.\*

The purpose of the trial, of course, was to show Milošević's relationship to the crimes, but the Prosecution could not simply stipulate that crimes had occurred and spend its time and effort proving Milošević's relationship to them; it also had to establish the underlying acts themselves. For *Kosovo*, in particular, there were no prior cases, or even investigations, on which to rely—a consequence of having issued the indictment “in real time;” the *Kosovo* phase was not the culmination of a series of cases but the Prosecution's first attempt.

The result was that considerable courtroom time had to be spent during the opening phase establishing the existence of the crime base. This required close examination of individual killing sites and testimony by eyewitnesses who, by their very circumstances, could speak to terrible events in this village or that prison camp but not to Milošević's role. The Prosecution's original ambition to bring representative evidence from different areas and phases of the conflict, as well as different kinds of crimes and victims, multiplied the number of discrete events about which the Prosecution had to present witnesses and evidence.

For *Bosnia* and *Croatia*, the Prosecution was able to rely to a considerable extent on the information and evidence it had developed in previous cases, but had a different challenge: to build the case for the de facto lines of authority from the RS and RSK to Milošević.<sup>28</sup> This resulted in a relatively much larger share of evidence being proffered concerning the political relationships among the Serb factions—in Kosovo, Milošević's de jure lines of authority were easy to demonstrate.\* And even though the Prosecution could rely on its prior jurisprudence, it still placed strains on its case in the *Bosnia* phase by committing to present a comprehensive and representative crime base, with the result that, by the end of its case, the Prosecution had failed to lead any specific evidence on many individual elements of the charges.

***Theories of Liability in a Leadership Trial—JCE:*** Of course, even establishing the fact of a given crime would not necessarily say anything about Milošević's relationship to it—that required a separate inquiry into the flow of information and chains of command between the killing fields and *Beli Dvor*, the presidential offices in Belgrade. *Milošević* was a leadership case, which implied a certain structure for the evidence. The Prosecution had to prove, for each count, that Milošević was directly responsible either for ordering, planning, or aiding the perpetration of crimes, or that he had an obligation to prevent or punish the crimes under the theory of command responsibility. But evidence of his actual involvement was often difficult to establish—Milošević was not physically present at any of the crime scenes, and it was improbable that he even knew about many specific actions that took place,† so each of these basic theories of liability required proving his relationship to chains of command for the armed forces, police, and paramilitaries doing the actual murders, rapes, and expulsions.

Proof of his command responsibility could be derived from demonstrating his legal and factual control of the forces committing the crimes, together with his failure to prevent or punish. But proof of his direct liability required either documentary evidence, testimony from insiders, or a theory that could explain Milošević's necessary and logical relationship to known events and the actions of others. The testimony of individuals who were his victims was essential for establishing the nature of the underlying crimes, but did little to establish Milošević's

relationship to those crimes. For this, the Prosecution relied on intercepted telephone calls, Milošević's former international interlocutors, and insiders.<sup>‡</sup>

The complexities of a leadership trial required an ambitious interpretation of liability. The principal interpretative tool at the Prosecution's disposal was the theory of JCE, discussed in [Chapter 2](#). JCE allowed the Prosecution not only to assert Milošević's own guilt, but to do so in a way that also showed or implied the complicity of the senior leadership in the FRY and Serbia, the RS in Bosnia, and the RSK in Croatia.<sup>29</sup> The theory of JCE constructed—from the Prosecution's perspective, revealed—a systemic relationship between the actors in these otherwise discrete conflicts, and positioned Milošević at the center of that web. In fact, Milošević was the only formal, legal point of connection between the members of the JCE involved in Kosovo and those involved in Bosnia and Croatia; no other named member of the JCE was alleged to have been involved in all the conflicts, as Milošević was.

In certain respects, as we have seen concerning the Tribunal in general, JCE not only simplified the Prosecution's evidentiary task, it also fit with the overarching Greater Serbia theory that had formed the basis for joinder of the three indictments.\*

***The Effects of Joinder:*** As noted, the Prosecution had asked to join the three separate, sizable indictments in one trial, and this happened just before trial began. This decision, on its own, swelled the size of the trial enormously, although three separate trials might well have lasted longer and introduced other complexities, such as overlap between different trials and appeals. Beyond the problem of the sheer size of the trial, however, the decision to join the indictments influenced particular features of the case, not only increasing its complexity but altering its substance.<sup>†</sup>

Joinder requires that there be some threshold element of commonality between separate indictments—a single transaction.<sup>30</sup> The Prosecution successfully argued that Milošević and others had been involved in a “single transaction” of alleged crimes spanning three conflicts, three countries and eight years, which was apparent in the overarching JCE whose members sought to create a Greater Serbia through the violent expulsion of non-Serbs.<sup>31</sup> The Prosecution's theory, implicitly, sought to explain the origins, course, and essential unity of the entire Yugoslav



conflict—a causal account immediately attractive to those parties and constituencies for whom the Tribunal’s purpose was to create a comprehensive narrative that could have a transformative impact on the war zones.<sup>‡</sup>

Joinder also made it doctrinally necessary to have a single transaction with some over-arching theme—and therefore, quite possibly, it was the desire for joinder that drove the choice of this narrative, rather than the other way round. The logical or causal relationship between the requirements of joinder and the Prosecution’s theory is ambiguous. In formal, doctrinal terms, the Prosecution moved to join the indictments because it perceived a commonality centered on the idea of Greater Serbia. But is this what happened? Perhaps instead the Prosecution—desiring to join the trials for other reasons (economy, convenience, publicity) and knowing what the rules required—searched for a commonality. That they did not find a very persuasive one simply indicates that the best factual characterization of these events did not easily fit the doctrinal frame.

Partly as a consequence of the joinder decision, the Prosecution led with the *Kosovo* phase. In certain respects this was logical, as *Kosovo* was the most developed of the indictments, with the most straightforward theory of liability, including clear and plausible de jure lines of authority leading from VJ forces and Serbian police units to Milošević. At the same time, however, leading with the *Kosovo* indictment required the Prosecution to present its case out of chronological order, a potentially consequential matter given the unified nature of the case it was bringing and its reliance on an overarching theory about actions taken over time to create a Greater Serbia.\* In addition, leading with events in Kosovo meant putting first the part of the case most amenable to Milošević’s preferred courtroom strategy of appealing to Serbian nationalism: the *Kosovo* phase involved crimes against Kosovar Albanians—the community with which Serbs had the worst relations—that had taken place at the same time as NATO’s military intervention, which had produced among Serbs the kind of unifying resentment that predictably occurs when people are bombed.

***Evidence and Testimony:*** The tensions between the Prosecution’s ambitious strategy and the challenges it posed played out in witness testimony and evidence. The sheer production of information in the trial was overwhelming: 1.2 million pages of evidence, 930 exhibits, and 117 videos; 47,000 pages of trial transcripts; 64,000 pages of filings; 328 live



witnesses. In certain respects, the contours of the Prosecution's case were driven by the need—formally imposed by the Chamber, but also an almost logical problem—to constrain the trial's metastasis. Witness lists were pared down—the Prosecution originally sought to call a thousand witnesses, just as Milošević in his phase was to prove jarringly ambitious in trying to call every imaginable actor to the stand—and crime sites reduced. Often, allegations were simply abandoned without any effort to present evidence.<sup>32</sup> Perhaps the most striking example of this concerns the Sarajevo sniping and shelling counts. The original indictment had charged 44 sniping and 27 shelling incidents. When the *Amici* challenged all but one of each, the Prosecution conceded that it lacked specific evidence, but argued—unsuccessfully—that “overview evidence” of a shelling and sniping campaign should be sufficient.<sup>†</sup>

*Witnesses:* The Prosecution had initially planned on building its case with insider witnesses—quite logical in a leadership case in which the formal lines of authority were not necessarily the real ones;<sup>‡</sup> the initial indictments, though formally trial-ready, were in that sense a bet on the catalytic effect the trial process might have in delegitimizing the remnants of Milošević's regime, or at least a bet that the Prosecution's case would benefit from the same processes that had led to Milošević's transfer to the Tribunal. The Prosecution had some mixed success in securing insiders, though much less than it had hoped, and some witnesses proved a mixed blessing when they recanted testimony or proved far more timid in open court than in their statements.<sup>33</sup>

The Prosecution also relied relatively heavily on international witnesses—diplomats, generals, and politicians who had met with Milošević during the 1990s, as well as expert witnesses familiar with the history and politics of the former Yugoslavia. The first category were effective in showing Milošević's real level of control and power, as well as demonstrating, in some cases, that Milošević was specifically aware of violent and criminal events. At the same time, the very fact that these were foreign officials, often from the very countries that had so recently warred against Serbia, played directly into Milošević's preferred framing of the trial as a continuation of Western and NATO aggression against victim Serbs. General Wesley Clark, for example, was able to provide powerful corroboration of the Prosecution's core assertions that Milošević was in

effective control of military forces in Bosnia—even providing, on one reading, direct indications that Milošević may have known about the killings at Srebrenica.<sup>34</sup> Still, Clark was something else as well—the senior military commander of NATO’s 1999 campaign against Serbia.

Of course this is a general problem in criminal trials—people willing to testify against a defendant often have their own history, and their own biases—but direct, compromising conflicts of this kind were multiple and manifest in *Milošević*. The frequent use of such witnesses suggests several possibilities: that the Prosecution really was focused on a narrow, forensic case and uninterested in the broader politics; that the Prosecution was tone-deaf; or that the Prosecution’s original strategy of turning Serbian insiders had essentially failed, and it turned to an alternative that, although forensically effective, also played into Milošević’s hands.

As in many of its other trials, the Prosecution also introduced a number of expert witnesses—historians, experts on genocide, military analysts examining particular incidents during the wars—in all some 19 reports, accompanied by testimony. In many respects, this trial represented the most ambitious elaboration of the historical strategy advanced by the Prosecution in its early cases—historical argument used, not merely for background (as in *Tadić*) but to advance causal claims thought to be essential to its case, especially concerning genocide and JCE.\* Many of the expert witnesses were employees of the Prosecution.

The other major category of witnesses consisted of ordinary former Yugoslavs—survivors or the family members of victims who testified to the events they themselves had witnessed.† As noted, their purpose, for the Prosecution, was to provide essential evidence of the crime base, but only rarely—say, in the case of a member of the VJ or MUP—to testify concerning the middle rungs of the hierarchy of violence leading to Milošević himself. In that sense, the actual victims were of marginal importance to the main lines of contestation in this leadership trial.‡ Still, even though the forensic purposes of the Tribunal did not place victims at the center of proceedings, there was, consistent with the broader purposes of reconciliation that had always surrounded the ICTY, a ready expectation that testifying would provide a kind of catharsis for witnesses, and vicariously for the broader populations they represented or which identified with them.

It is undoubtedly true that some witnesses experienced a sense of vindication or psychological relief from confronting their oppressor—alleged oppressor, technically, but there was surely little doubt in the minds of those on the stand. Still, it is not clear that the experience was cathartic for all. Many observers have noted the dynamics that often developed between these victim-witnesses and Milošević.<sup>35</sup> Many (though certainly not all) of those testifying were rural, relatively uneducated people, and were often intimidated or overwhelmed during the trial—not only because of the traumatic events they were describing but because of the encounter with their educated, worldly, and confident former president.\* Milošević was often (though not always) curiously well-informed about the lives and circumstances of these villagers: Although he had always been known to have a strong grasp of wonkish detail, the level of knowledge he displayed during trial—concerning, say, the location of a house in relation to a power line in a small village, or the intimate details of a witness’ background—was hardly information he could retrieve from memory, and showed how effective a network of legal assistance and contacts in the military, government, and security services of Serbia Milošević maintained. All of this made the process of testifying unsettling and unsatisfying for many witnesses. And, of course, in some cases, there is good reason to suppose that witnesses were concerned about the consequences of testifying.<sup>36</sup>

Under the rules of the Tribunal, testimony for the Prosecution gives the Accused the right to cross-examine, which Milošević made liberal use of. Indeed, one of the key drivers of the Prosecution case was the Accused himself: The press of time that weighed so heavily on the Prosecution’s case was not only a function of its scope, but also of the broad license granted to Milošević by the Chamber to conduct extensive cross-examinations, often consuming considerably more time than the Prosecution itself did. Later in the trial, the judges were more careful in accounting for the actual use of time by each party, but early on, the Prosecution’s clock was often running at the discretion of an Accused who was demonstrably uninterested in keeping the proceedings brief. This inevitably affected the Prosecution’s decisions about what witnesses to call, as each witness raised the specter of Milošević clawing away increasingly precious time allotted to the Prosecution.†



*The Perverse Effect of Written Submissions:* This calculation about the effects of cross-examination was exacerbated by the Tribunal's rules on the form of testimony. Shortly before the *Milošević* trial opened, the Tribunal had expanded the possibilities for written, rather than oral, testimony—so-called Rule 92*bis* testimony.<sup>37</sup> The purpose was to streamline long trials and spare witnesses the difficulties of testimony far from home, but the effect in *Milošević* was quite different.

The Prosecution made liberal use of Rule 92*bis*, in part so that it could introduce far more evidence than it could through the more laborious oral testimony process—a long trial would have been unmanageably longer if every witness had testified for the Prosecution *viva voce*. However, considerations of fairness and the strong pull of judicial norms led the Chamber to allow Milošević to cross-examine Rule 92*bis* witnesses in person. This meant that Prosecution witnesses would often not testify directly, instead having their statements noted into the record, but would then be extensively cross-examined and challenged.\*

On occasion, of course, this allowed additional points favorable to the Prosecution to enter the record that otherwise might not have, when Milošević raised issues that had not been introduced in the witness' statement.<sup>38</sup> But this was really an artifact of the cross-examination process in general—Milošević often made such mistakes, either out of inexperience or because his political strategy had entirely different purposes—and would have occurred even if the witnesses had testified directly. The net effect of the Rule 92*bis* process, therefore, was to minimize the visibility of the Prosecution's case, and highlight that of the Accused. On many a day of trial, the only visible story—the points of drama—were Milošević laying into a witness, with the Prosecution's claims mutely read into the record.

Some witness testimony received less publicity for entirely different institutional considerations. Given the nature of the crimes alleged and the still-fraught political scene in the former Yugoslavia, there were legitimate concerns about the safety of individuals who testified in the trial. This concern was a general one, and the Tribunal had established protections for evidence and witnesses that went far beyond protections afforded in municipal legal systems. Protections range from withholding of a witness' name and distortion of his image and voice to lengthy



testimony in closed sessions; numerous filings are subject to confidentiality rules.<sup>†</sup> It is impossible to know, from the outside, exactly what testimony, of what quality or consequence, was given in secret, but the transcripts alone indicate that the number of protected witnesses was substantial.<sup>‡</sup>

None of this implies that the Prosecution was ultimately prevented from making an effective case. Over the two years of its case, the Prosecution produced an enormous documentary record, and certain moments of testimony or pieces of evidence, such as the *Škorpioni* video, showing the execution of Muslims from Srebrenica by Serbian forces, had undeniable force.<sup>§</sup> Particular pieces of evidence—such as intercepted communications between Milošević and Serb military and civilian leaders in Bosnia and Croatia—were of considerable value to the Prosecution case.<sup>39</sup> When the *Amici* challenged large parts of the Prosecution's case in a motion to acquit, the Chamber upheld every count and ordered the trial to continue, meaning that the Prosecution had at least met the minimum burden of bringing a case that could yield conviction, and possibly had done much more.

Still, the challenges produced by the size, complexity, and strategy of the Prosecution's case, and the scope afforded it by the Chamber, marked the Prosecution phase and raised considerable doubts about the solidity of its case.<sup>40</sup> At the end of the *Bosnia* phase, the Prosecution case stumbled to anticlimax. In contrast with the expansive expectations that girded the opening of the trial, the maneuvers here were narrow, technical, and cautious. There was no closing statement, only a written notification that the Prosecution would rest its case on 25 February 2004.<sup>41</sup> Although there were efforts to reopen particular parts of the case, and Milošević's actions in defense allowed the introduction of further evidence, this was the end of the Prosecution's main effort to shape the facts and the narrative.

### **C. The Defense phase**

At the end of the Prosecution phase, the *Amici Curiae* moved for acquittal on a number of counts and charges, though not on the entire case. In June 2004, the Chamber upheld all the counts but entered acquittals on a large number of specific allegations.<sup>42\*</sup> This meant that trial would continue. In

his own defense case, Milošević continued the themes and strategy evident in his behavior from the beginning of the trial—a highly politicized defense identifying himself and the Serbian nation as co-defendants. Throughout the trial, Milošević denied the legitimacy of the Tribunal, although in fact he took an active role in the proceedings, cross-examining witnesses, and arguing points.<sup>43</sup> His witnesses were often of minimal value to a forensic defense, but were intended to vindicate his claim about Western imperial encroachment. Even his choice of hostile witnesses reflected this orientation—many were Western politicians who were unlikely to actually come testify on his behalf, but demonstrated his thesis even by their refusal, and produced vivid political theater.<sup>44</sup>

***The Self-Representation Crisis:*** But perhaps the signal aspect of Milošević’s conduct—and of the trial as a whole—was his decision to defend himself. No other defendant had yet availed himself of this right, but Milošević—evidently recognizing the potential and the power that self-representation afforded him—had immediately seized upon it. When they ordered the trial to continue, the judges revisited the issue and appointed the *Amici* as defense counsel,<sup>45</sup> setting the stage for an intensification of the struggle among Chamber, Prosecution, and Accused that had begun with Milošević’s first appearance in 2001, which we may refer to as the trial’s “self-representation crisis.”†

Milošević’s decision to defend himself had far-reaching consequences for the conduct of the trial and its perception, and has produced a clear legacy in the doctrine and practice of ICL. From the very beginning of the trial, Milošević signaled his intention to represent himself. The Prosecution strongly opposed this, and attempted, at various points, to persuade the Chamber to impose counsel. Its reasons were complex.

Normally, one might expect a prosecutor to be quietly pleased that a defendant would take such an unwise action, but the Prosecution recognized the risks it faced from a defiant Milošević—risks both to the legitimacy of the process and to its own ability to craft and control the narrative of trial. From the first status conference held in August 2001, the Prosecution argued that Trial Chamber should impose counsel in addition to the *Amici Curiae*.<sup>46</sup> In November 2002, the Prosecution made a formal submission asserting that because of Milošević’s disruptive behavior and recurring illness, the Chamber should appoint the *Amici* as counsel.<sup>47</sup> The

Chamber too was cognizant of the dangers to the trial, but was also constrained by the clear doctrinal structure in which it operated, because the Statute of the ICTY affords an unambiguous right to defend oneself in most circumstances.<sup>48</sup>

Milošević's bravura decision to represent himself was qualified in practice, however. In fact, Milošević was advised by a considerable cadre of lawyers and researchers, both in The Hague and in Serbia. There was nothing untoward about this assistance, which the Tribunal was aware of, allowed, and even facilitated.\* But it was not a fact Milošević himself widely advertised—especially not the scope of this assistance—presumably as it clashed with the image of him defending himself in splendid and sympathetic isolation against an overbearing, imperial bureaucracy.

And, regardless of the size of the support staff on which Milošević drew, there were limits. His access to resources and to the outside, though expansive by the standards of Scheveningen, was nonetheless quite restricted compared with that of the Prosecution, and encountered a bottleneck at the jailhouse door: Milošević may have had a large staff of supporters, but he could not meet with them directly. Most critically, whatever help he received from outside, he was on his own in court, with no advisors to fall back on or to hand him notes, or take up a line of questioning on his behalf if he was tired, unwell, unprepared, or faltering.<sup>49</sup>

Representing himself brought tremendous advantages—most especially in giving Milošević vastly more time before the court and cameras than he would have had as a defendant—and active influence on the tone, pace, and agenda of the trial. Rather than sitting mutely in a corner, Milošević was at the center of the court process for every witness, whether his or the Prosecution's.

Self-representation also gave Milošević specific formal and procedural advantages. Had he testified in his capacity as the Accused, Milošević would have been subject to cross-examination by the Prosecution. However, appearing as his own attorney, Milošević was free to push that role as far as the judges would allow, using his own examinations in chief and cross-examinations to press his broader political claims and to make statements that, in effect, constituted his own testimony, but were immune



from cross-examination. This greater scope for action was particularly apparent on those occasions when Milošević introduced evidence that was apparently fabricated or distorted.<sup>50</sup>

At the same time, it is clear Milošević made many errors of the kind a trained specialist would not make—as well as errors that counsel could not make by virtue of not having been the president of Serbia and the FRY. In cross-examination, for example, Milošević sometimes effectively demonstrated his own authority in ways that made the Prosecution's case for it. Indeed, to some, the level of knowledge he displayed in court—and what it suggested about the resources at his disposal—read as an implicit concession that he really was as powerful, and involved, as the indictment alleged. He also focused almost exclusively on Kosovo, largely failing to mount any defense concerning charges for Bosnia and Croatia. In December 2005, the judges rejected his request for additional time, noting that he had already used about three-quarters of his allotted time and yet was still discussing Kosovo.<sup>51</sup>

Still, on balance it seems clear that self-representation was a net benefit to Milošević—especially if one is attentive to the extralegal aspects that were, for him, more important than the construction of a technically satisfactory defense case<sup>52</sup>—and a net harm to the Prosecution. It was also harmful to the institution, as the widespread view that the trial was being run by Milošević damaged the Tribunal's reputation.\*

With the start of the Defense phase, the Chamber, citing continued concern about Milošević's health and the increased burden of defending himself, finally did appoint counsel—and in a move that was as logical as it was perhaps ill-advised, took the Prosecution's earlier advice and appointed the *Amici* Steven Kay and Gillian Higgins as defense counsel.<sup>53</sup> This was logical because the *Amici* had been acting as quasi-counsel and were familiar with the case. But they had been, all along, agents of the Chamber, not of Milošević, and he did not trust them.<sup>†</sup> Their appointment only exacerbated the problems inherent in a trial with an Accused determined to resist the authority of a court and to conduct his own defense, turning the chronic problem of Milošević's self-representation into a full-blown crisis.

Milošević refused to cooperate, and witnesses for the Defense boycotted the hearings en masse. The new defense counsel, left to guess at



Milošević's wishes based on his list of 1600 potential witnesses, were frozen out. Although in theory the Chamber could have simply treated this as a strategic choice by the Accused not to cooperate in his defense, and the nonappearance of witnesses as his (manufactured) misfortune, they recognized—accurately—that the integrity of the trial was at risk. By November 2004, the Appeals Chamber backed down, allowing Milošević to conduct his own defense throughout the trial.<sup>54</sup>

Some observers read Milošević's decision to represent himself as an expression of ego—the dictator unable to concede the reality of his newly straitened circumstances.<sup>55</sup> Such critiques were sometimes coupled with a palpable sense of frustration at the damage being done to the process, and a narrow set of assumptions about what constitutes rational behavior in a trial. From this perspective, Milošević was doing considerable damage to his own prospects for acquittal. From another perspective, however, Milošević's decision seemed eminently rational: an assessment—probably accurate—that his main chance for success rested on defying and delegitimizing the Tribunal, rather than contesting individual counts on the Prosecution's terms. Nor were ego and rationality at odds: Even if Milošević had no hope of acquittal—which, on his own public statements about the biased nature of the process, he ought not to have had—he did have hope of influencing his legacy and politics in Serbia, and these goals were arguably well served by a rejectionist strategy.

In any event, focusing on personality, though it may be useful for devising tactical and procedural responses to the problems of self-representation, is probably beside the point: If there is a dictatorial personality, its operation is almost a given in such cases. The more ICL focuses on those “most responsible,” the more it will confront the challenge of self-representing Accused who have constituents, agendas, and the power to affect courtroom process, public reception, and events outside the courtroom. In this regard, “the Milošević trial is rich in lessons about what to do and what not to do....”<sup>56</sup>

The self-representation crisis of *Milošević* compelled the Tribunal to devise new procedures for dealing with such defendants. The Registry developed a formal pro se liaison office to facilitate self-representation. Equally important, the Tribunal has drawn lessons from the *Milošević* trial and has become more aggressive about policing the boundaries of self-

representation. The influence of these processes, and of the less-yielding attitude the ICTY's judges have learned from *Milošević*, can be seen in the trials of Šešelj, Karadžić, and Mladić, as well as in other tribunals, such as the trial of Charles Taylor before the Special Court for Sierra Leone.<sup>57</sup>

***Relations with the Chamber:*** The judges of the *Milošević* Chamber have come under considerable criticism for their failure to manage the trial with a firmer hand.<sup>58</sup> Part of this concerned their management of the Prosecution case, but the dominant theme was surely their relations with Milošević—certainly, from one perspective, criticisms of how they handled the Prosecution case were really a function of their inability to constrain Milošević, as on that view Milošević's posturing, interminable cross-examinations, and health delays were the principal brake on the trial's progress.\*

***Health:***<sup>59</sup> Milošević's health declined considerably during the course of the trial. Even when he arrived at the Tribunal in 2001, he suffered from hypertension and a number of cardiac ailments, and he was regularly treated or referred to medical specialists. During the Prosecution phase, on the advice of Milošević's doctors, the judges had radically reduced the schedule of the trial—in August 2002, to allow four days of rest every two weeks, and in September 2003, to three sessions a week—a practice that continued during the Defense phase.<sup>60</sup> In addition, there were numerous adjournments for health reasons, totaling 66 days during the Prosecution phase, and five delays in the start of the Defense phase.<sup>61</sup> As we have seen, the assignment of counsel in the Defense phase was in part a response to Milošević's deteriorating health.<sup>†</sup> In December 2005, Milošević petitioned to be released to Russia for medical treatment; the Chamber's denial of this request—which was widely supposed at the time to carry the real risk that the Accused would never return once in a sympathetic country<sup>62</sup>—was on appeal at the time Milošević died.<sup>63</sup>

A frequent charge was that Milošević deployed his medical condition to strategic ends, falling ill after particularly difficult witnesses or at other convenient moments, or more generally using claims of ill health to delay proceedings.<sup>64</sup> It is certainly true that Milošević frequently refused to take his prescribed medicines or to be hospitalized when this was recommended,<sup>65</sup> and that he was able to secure alternative medications

illicitly—including some that could counteract his hypertension medications<sup>66</sup>—by making use of the privileged communications he enjoyed as a self-representing Accused.<sup>67</sup> Still, in retrospect, imprecations by external observers declaring that Milošević's health absences were strategic look both uncharitable and misinformed. The man, it turns out, really was ill. Still, whatever the causes, the effect was to dramatically slow down the trial. In this sense, Milošević's health was a significant contributor to the length of a trial that was never going to be short.

Milošević's health was not the only medical issue that affected the trial. Richard May, the presiding judge, had become increasingly ill, and resigned in February 2004, just two days before the end of the Prosecution phase; he died that July. His replacement on the bench, Iain Bonomy, was seated in June. Thus, one of the three judges set to hear the case and render judgment had not been present for any of the Prosecution phase, and had only the transcripts and documentary materials on which to rely. This is not unusual—domestic legal systems also have to deal with the problems created by judges dying, becoming incapacitated, or retiring. But in this case, one standard remedy—mistrial—was almost unthinkable, which, together with the way things actually ended up, suggests the fragility of ICL as an immature legal project.

### **D. The end of the trial of the century**

Milošević died sometime in the morning of 11 March 2006; the Chamber formally terminated proceedings on 14 March. After the termination of the trial, Del Ponte mentioned that the trial was only 40 hours from completion.<sup>68</sup> This was true as a matter of calendar hours, but did not count time for cross-examination or administration, let alone health delays—indeed, when Milošević died, the trial had been adjourned for 12 days. At the rate things had been going, the trial would have continued for a few months—the Defense phase was scheduled to finish in May 2006—after which there would have been a delay of six months to a year for the final judgment to be issued, at any point during which his death would have terminated proceedings; and presumably both sides would have appealed.\*

*The Investigation:* There were frequent reports in the media—especially in Serbia and Russia—that Milošević had been poisoned by the Tribunal in order to silence him or avoid embarrassment from an acquittal,



or that he had committed suicide. Milošević had written to the Russian Embassy in The Hague on 8 March complaining about his medical treatment;<sup>69</sup> this, coupled with the Chamber's denial of his request to be treated in Russia, increased speculation that the Tribunal had silenced Milošević, although there is no evidence of this.

Even before this speculation arose, it must have been immediately obvious to the Tribunal that the circumstances of Milošević's death would be questioned. The same day Milošević died, the president of the Tribunal, Judge Fausto Pocar, assigned Judge Kevin Parker to conduct an investigation into the circumstances of Milošević's death, which was completed that May. The actual death was investigated by the Dutch authorities, who also conducted an autopsy. The autopsy and related medical reports found the cause of death to be a heart attack,<sup>70</sup> and excluded the possibility of murder or suicide. This finding is obviously unsatisfactory to certain observers, who maintain that the investigations were flawed, or even a cover-up, and that Milošević was murdered.<sup>71</sup>

**Contested Legacies:** Though it perhaps no longer seems so anomalous, the *Milošević* trial was criticized for its great length and inordinate ambition—the more so given its termination. The very fact that the partisans of various sides each seek to find fault with the other on this particular point—the Prosecution's critics pointing to its excessive ambition in charging and joining indictments, the Prosecution's defenders pointing to Milošević's extravagantly dilatory tactics—suggests that all agree the trial was bloated and disproportionate.

Some effects of the *Milošević* trial that are most clear and direct stem from this consensus. It seems that the trial of Saddam Hussein was as focused and narrow as it was—addressing a single crime site—in significant part a response to the sprawl of *Milošević*, though the vicissitudes and outcome of that trial, in turn, have generated their own criticisms. Equally, the self-representation crisis and the difficulties associated with the Rule 98bis motion to acquit have generated concrete reforms within the ICTY that will affect practice in other tribunals.

The substantive claims made in *Milošević* have also had effects on the later jurisprudence of the ICTY. As we have seen, the fact that *Milošević* represented the pinnacle of an alleged JCE spanning the entirety of the wars had consequences for the kinds of evidence that were led. For the



*Bosnia and Croatia* phases, evidence of the crime base and of relationships between actors could be introduced from other cases as adjudicated facts, subject to juridical norms concerning equality of arms and the right to confront witnesses (though not for *Kosovo*, as *Milošević* was the first case covering that conflict). Later, after the *Milošević* trial, this same process has been equally available for other, related cases—which is why documents and motions continued to be filed under the *Milošević* case, requesting the lifting of confidentiality for documents relevant to other trials.<sup>72</sup> Of course, while evidence was introduced (and challenged by *Milošević*) during the Prosecution phase, the Defense evidence was prematurely terminated and there was there never any adjudication, and so its probative value is minimal.

Beyond the reprocessing of evidence, however, those other cases, have frequently been seen as proxies for the missing judgment in *Milošević*, present an ambiguous picture of what might have been decided. To take one example, the 2011 conviction of Momčilo Perišić, the VJ Chief of Staff during the Bosnian and Croatian wars, could be seen as an implicit condemnation of *Milošević* himself—but then, in 2013, Perišić was acquitted on all counts, a turn that made it far more difficult to see how *Milošević*, if he acted through Perišić, could have been found guilty for the same crimes. The unrendered judgment is only imperfectly—and, as *Perišić* suggests—only contingently available by proxy drawing on other cases.

Adding to the epistemological uncertainty, we must consider the strategic influence *Milošević* has exerted on other cases: It seems clear that the Prosecution's strategy in presenting the relationships and responsibility between senior Serbs in Belgrade and Pale changed in cases after *Milošević*, and this may in significant part represent the Prosecution's own assessment of the prospects its original theory faced, in light of its experience in *Milošević*. In turn, of course, the outcomes of those cases may have been different. But whatever the strategic considerations, a changing Prosecution narrative across these cases raises questions about whether the Prosecution, or the ICTY more generally, is producing a coherent narrative of Belgrade's relationship to the Yugoslav wars.

In one sense, the premature termination of *Milošević* is a gift to historiography. The existence of the trial's truly enormous documentary

record can provide historians with access to materials they might never have been able to assemble, and certainly not as efficiently—and this is true notwithstanding the lack of a verdict.\* Indeed, in the absence of a formal verdict, the scope outside observers have to craft the judgment they think most plausible is even more open than it would have been had there been a decisive outcome. And of course the materials will be valuable even for researchers who are not interested in the question of Milošević's criminal guilt, but rather wish to know about the broader conflicts and conditions in which that narrower legal question was embedded:

[The evidence] should have an effect on how future generations understand the region's history and how the conflicts came to pass: because no truth commission has been established to look into the events in the region, the Milosevic trial may be one of the few venues in which a great deal of evidence was consolidated about the conflicts. The fact that Milosevic had the opportunity to test the prosecutor's evidence in cross-examination enhances its value as a historical record.<sup>73</sup>

At the same time, the large role that confidential processes played in the trial will affect its public legacy. We have seen above that the minutes of the VSO were never handed over to the ICJ, which has led to considerable speculation about what effect those documents might have had on the outcome in the *Bosnian Genocide* case. Considerable portions of the *Milošević* trial's evidence remain unavailable to researchers or the public, and there are no plans for them to be made fully accessible.

The very fact that Milošević's trial terminated without judgment certainly poses a challenge to views of ICL that place considerable emphasis on the process of trial as having educative or transformative effects. If that were easily, uncomplicatedly so, the *Milošević* trial—which was the Prosecution's flagship case and the focal point for its efforts—would have had greater or more observable effects than it has, despite its lack of formal judgment. But what exactly the effects have been or might be—the broader legacies of the *Milošević* trial—are contested questions, as yet uncertain, and the subject of many of the chapters that follow.

## **PART TWO**

### **Causes of Death**

Milošević's own death was the formal cause of his trial's termination, but is that what killed the trial? Was it murder, suicide, or a preventable accident? The chapters in this section examine why the trial developed as it did: What strategies were adopted by the Prosecution and Chambers? What role did Milošević's self-representation play? Was the Prosecution justly criticized for attempting to "tell the story of the whole war?" Did the ICTY's design and norms contribute to the trial's ultimate demise? Was the trial fair—and to whom?

# 5

## Real Justice, in Time

### The Initial Indictment of Milošević

CLINT WILLIAMSON

*Chief Prosecutor for the EU Special Investigative Task Force\**

*Although he was widely perceived as the one ultimately responsible for the violence that had engulfed the former Yugoslavia, Milošević was never charged with any crime while the wars in Croatia and Bosnia were going on. This was due to a variety of factors: the official positions he held during those wars, the difficulties associated with securing direct incriminating evidence against him, and to some extent the ICTY's own investigative and prosecutorial strategy. The factual circumstances associated with the Kosovo conflict and Milošević's changed de jure role, however, made an indictment possible. In a four-month period following the Račak massacre, as violence mounted in Kosovo, the ICTY intensified its investigative efforts and refocused its resources to produce an indictment of Milošević. With Chief Prosecutor Arbour's personal engagement and backing, a team of prosecutors, analysts, and investigators produced a comprehensive indictment against Milošević and other senior Serbian leaders in May 1999, which paved the way for the later Bosnia and Croatia indictments.*

## I. The Final Spark



Early in the morning on Friday, 15 January 1999, Serbian security forces went into the village of Račak (Reçak), in Kosovo. By the time they left in the middle of the afternoon, 45 ethnic Albanian villagers had been killed. Among the dead was a woman, a 70-year-old man, and a 13-year-old boy. Their bodies were spread throughout Račak and along a dirt track leading away from the village, where 25 of the victims were executed. Altogether, it presented a horrific scene when international monitors from the Organization for Security and Cooperation in Europe arrived early the next morning. Infuriated by what he had seen, the Head of the OSCE's Kosovo Verification Mission (KVM), Ambassador William Walker, went on television and described what had happened as “an unspeakable atrocity” and as a “crime very much against humanity.”<sup>1</sup>

That same Friday, I had flown on short notice from The Netherlands to Malta to interview a former *Služba državne bezbednosti* (State Security Service or SDB) operative from Serbia who had walked into a Western embassy and requested political asylum. Diplomats at the embassy had determined that he had information that might be of use to the ICTY, and I had been dispatched to Valletta to debrief him. I had been in a secure room meeting with the witness Friday and through the entire day on Saturday, so I had not seen any of the news reports about Račak. After finishing for the day, I had gone out for a walk along Valletta's city walls, accompanied by an investigator from the ICTY who had traveled with me to Malta. As we walked, my cell phone rang: It was ICTY Prosecutor Louise Arbour calling to say that there had been an incident in Račak the previous day. She told me that she intended to go personally to Kosovo to initiate an investigation of the killings and she asked me to accompany her.

I flew back to The Hague, repacked, and met Arbour early on Monday morning, 18 January, at Amsterdam's Schiphol Airport. We flew to Skopje, where we were met by a senior NATO commander who briefed us on the security situation. He told us that they considered it very unlikely that the Serbs would allow us into Kosovo, saying instead that we were going to be turned away at the border crossing. NATO troops would provide us an escort to the border, but that there was nothing further they could do if Serbia denied us entry.

We then drove in a convoy to the border where we passed through the Macedonian checkpoint easily and then arrived at the Serbian checkpoint. There were dozens of journalists assembled at the border post—this was

not a secret mission, but a very public one—and Arbour and I had to wade through them to get to the customs officer, who looked very uneasy, sweating profusely under the lights of the news cameras. Arbour stated that she was there to cross into Kosovo in her capacity as ICTY Prosecutor; the border guard read a prepared statement saying that she would not be allowed entry.<sup>2</sup> The whole episode took fewer than ten minutes. We got back into our vehicles and returned to Skopje—everything having transpired just as we expected.

Over the next two days, Arbour and I, along with two ICTY investigators, stayed in Skopje as negotiations played out in Belgrade. We were in frequent contact with General Wesley Clark, then the NATO Supreme Commander, who was in Belgrade meeting with Milošević in the hopes of crafting some sort of solution that would allow us access to Račak.<sup>3</sup> Far from giving in, however, Milošević was demanding that Walker be removed as head of the KVM. We felt this was an attempt to divert attention from the question of an ICTY investigation—Milošević made this demand in response to Walker’s characterizations of the events in Račak, but only several days after the fact, and only when pressure had begun to mount on him to allow an investigation.\* The question of Walker’s fate, though, became a matter of principle for the U.S. and European governments, which did not want Milošević dictating who could head a mission operating under international auspices.\*

As for ICTY access, Milošević offered various alternatives—a meeting for Arbour and me with his Minister of Justice in Belgrade, even an escorted visit to Račak with the Minister—but nothing close to what we needed to conduct a meaningful investigation. Milošević eventually gave in on Walker remaining as head of KVM, a concession that had little real consequence for Belgrade. He stood firm against allowing the ICTY access, however—something that potentially would have had very real consequences for him and his government. In classic Milošević style, he had provoked a crisis over Walker, elevating that issue and effectively linking it to the ICTY’s investigation of what Milošević’s forces were doing in Kosovo. In the end, he succeeded in forestalling the ICTY’s work by giving in on a matter that he cared little about, but that he knew Western governments would see as vitally important. As soon as it became clear that we would not get access to Kosovo—something that we knew

from the outset was only a remote possibility—Arbour decided that it did not make sense to remain in Skopje any longer. We flew back to The Hague, leaving the two investigators in Macedonia in the unlikely event that some breakthrough would give us access to Kosovo. As it turned out, there never was a breakthrough, and the Prosecution continued doing all of its investigative work from outside the province.

## **II. Kosovo Becomes a Priority**

Arbour's decision to go to Račak was much more than a symbolic gesture, however. She wanted to force the hand of Milošević's government, which had barred ICTY staff from continuing on-the-ground investigations in Kosovo. As the conflict between Serbian forces and Kosovar Albanian insurgents had intensified early in 1998, the ICTY had dedicated resources to the situation there and had initiated on-the-ground investigations. A small team of investigators and another lawyer in the Prosecution had started looking at potential crimes committed both by Kosovar Albanians against Serbs and by FRY and Serbian forces against Kosovar Albanians. The team had made two or three visits to Kosovo over the course of early-to mid-1998 and had interviewed witnesses to various incidents. They had also met with Serbian officials in Kosovo and Belgrade who gave the team information on crimes they alleged had been committed against Serb victims.

Despite this dual approach of one investigative team looking at crimes committed by both sides—something unique in the ICTY's history—Belgrade came to see the ICTY investigations as much more of a threat to them, because by Fall 1998, Serbian forces were engaged in increasingly harsh tactics against the Kosovars and NATO was on the verge of intervening militarily.<sup>4</sup> First, the FRY stopped issuing visas for ICTY investigators or lawyers to enter the country. Then, Belgrade formally notified the ICTY, through its liaison in Belgrade, Deyan Mihov, that it could not engage in any investigative work in the province—that anything happening there was a domestic law enforcement matter for Serbia and was not in the context of an armed conflict, and therefore was outside the jurisdiction of the ICTY.



Arbour was adamant that the ICTY did have jurisdiction. The Security Council Resolution creating the ICTY<sup>5</sup> and the Tribunal's Statute gave the ICTY jurisdiction over crimes committed in armed conflict on the territory of the former Yugoslavia after 1 January 1991, with no end-date specified.\* Although there was a legitimate question about when exactly the violence and instability in Kosovo had crossed the legal threshold to be considered an armed conflict—an issue that would be contested during the *Milošević* trial itself—as that situation worsened over the course of 1998, it had become increasingly clear that it had evolved into an armed conflict between the KLA and Serbian security forces.

After Račak there could be no more doubt. With the massacre of 45 people by Serbian forces in one village in a single day, it was obvious that the situation was getting out of control and that civilians were now starting to suffer the brunt of it, as they had earlier in Croatia and Bosnia. The ICTY had not been in existence when those wars began, but Arbour was determined that the Tribunal would assert its jurisdiction if it could help mitigate civilian suffering in another conflict—what she later famously referred to as “justice in real time.” When Račak occurred, she felt compelled to act. She recognized that by going to the border herself, as Chief Prosecutor, she would raise the ante on Serbia's policy of obstructing the Tribunal's work, making it more difficult for crimes to be committed with impunity.

Over the next month and a half, Kosovo continued to be at the center of the world's attention as political leaders and diplomats sought to find a solution to the growing crisis in the province. With the collapse of the Rambouillet talks, all parties seemed set on a path to war. On 20 March 1999, KVM observers in Kosovo were withdrawn in anticipation of NATO military intervention.<sup>6</sup> Coinciding with the KVM withdrawal, Serb forces launched a new offensive in central Kosovo, with a devastating impact on the civilian population.<sup>7</sup> When NATO did intervene four days later, launching an air campaign directed at Yugoslav and Serbian military and police targets in Kosovo and Serbia proper, Serbian forces stepped up their own operations in Kosovo, with the civilian population again bearing the brunt of it. Within days, Serbian military, paramilitary, and police units had committed a number of atrocities against Kosovar Albanians. With no international observers in the province, though, it was difficult for anyone



outside the province to know with any certainty what was really happening.<sup>8</sup>

Information soon began to flow, however: As the Serbian units forced tens, then hundreds, of thousands of Kosovars out of the province and into neighboring Albania, Macedonia, and Montenegro, stories of atrocities began filtering out with the refugees. It soon became clear that a highly organized and well-orchestrated operation was underway to displace as much of Kosovo's ethnic Albanian population as possible. As people were forced across the borders, they were compelled to surrender their passports, identity cards, vehicle licenses—anything that could be used in the future to show that they had ever lived in Kosovo. Media sources, NGOs, and governments were also soon reporting crimes of violence on a massive scale, based on the accounts of those who had fled the province.

As the evidence of these crimes multiplied, Arbour came to the conclusion that if the ICTY was to have any credibility it had to act, and act quickly, in response to the ongoing crimes. Up until this point, all of the ICTY's investigations had focused on historical events—crimes that had been committed months or even years before. At no time had the Prosecutor initiated an investigation of crimes as they were transpiring. During the last week of March—just one week after the bombing began—Arbour took the decision to do just that. In a meeting on 31 March, Arbour instructed Nancy Paterson, another American prosecutor, and me to take the lead over the investigation with an eye toward preparing an indictment as soon as we could gather sufficient evidence of the crimes we were hearing reported.

With strong support from Chief of Investigations John Ralston, Investigations Commander Bob Reid, and Kosovo Investigation Team Leader Dennis Milner, Paterson and I began assembling a team of lawyers, investigators, and analysts who would conduct this investigation. Beyond Arbour's instruction to be as comprehensive as possible and to move expeditiously, she left it to us to see where the evidence took us. Cognizant of the scale of what we were undertaking, we quickly worked out a division of responsibilities: I would go to the region and personally oversee the field investigations while Paterson would remain at the Tribunal, assembling the information we sent back. There, she would work closely with the military and political analysts—Philip Coe, Dolly Hanson, Ivan Lupis, Alexandra Milenov, Ivana Nizich, and Timothy

Waters—who were pulling together information on the internal workings of the FRY and Serbian governments, and the legal underpinnings of their control over the military and police forces doing the actual killing.

Almost immediately, I left for Tirana to establish an operational base for investigations. It was not particularly easy to get there, as flights to the region were suspended because of the air campaign. Eventually, several investigators and I flew to Rome, drove to Bari, and took an overnight ferry across the Adriatic to Durrës—a trip we shared with dozens of young Albanian émigrés from Europe and North America coming back to fight in Kosovo.

With access to Kosovo still out of the question, however, we had to focus our efforts in surrounding countries. As most of the refugees were being expelled into Albania and Macedonia, it made sense to set up bases in Tirana and Skopje. With teams of investigators in each place, we started compiling evidence of the crimes that were occurring. We received reports from a wide variety of sources, including journalists who had interviewed victims or witnesses of atrocities, UN staff or NGOs working with the refugees, medical workers who were treating the wounded, and governments that were seeing increasing signs of the scale of crimes, largely through satellite imagery.

The most salient information came to us directly from the refugees themselves as we worked our way through refugee centers on the border with Kosovo or in other Albanian and Macedonian towns. Often, we would hear from one refugee that someone from a certain village had told him of a horrible crime that occurred there. We would track down that person and try to find out the names of those from whom he had heard about the crime. Through this process, we were able in most cases to work our way back to an eyewitness, or at least to someone who could give us more concrete information as to what had occurred, and could tell us where to find solid evidence—such as a mass grave—if and when we again secured access to Kosovo.

A significant breakthrough came when a BBC reporter alerted me to a witness she had interviewed in one of the refugee camps outside Tirana. This young man had escaped across the border after a number of his family members had been killed in the town of Đakovica (Gjakova) in western Kosovo. The scenario that had played out with his relatives—police or paramilitary thugs coming into a home, demanding money,

murdering the men and sometimes the women in the house, stealing any valuables—had become commonplace. What made this man's case different was that he had videotaped the scene moments after the killers had left. He had inserted the footage into the middle of a recording of a soccer match, hoping that if he were caught with the tape, the Serbian authorities would view only the first bits of the recording, see that it was a football match, and then let him go. The ruse worked and he was able to smuggle the tape into Albania. For those of us conducting a long-distance investigation, this was the first close-up glance we had had of a crime scene, and the images depicted in the video footage provided powerful corroboration for this man's story and for the accounts given by his other surviving relatives. At that point, by mid-April, we felt like we had our first solid incident for inclusion in the indictment.

I spent most of April in Albania and Macedonia overseeing the investigative efforts, remaining in close contact with Paterson and Arbour. At the end of April, however, I returned to the Tribunal for consultations with Arbour and for a comprehensive review of the evidence that we had assembled. By that point, we had amassed solid information on several horrific crimes, including mass killings in a number of locations. Even though we were still not able to access crime scenes or collect physical exhibits, we felt the evidence we had collected was sufficient to include these incidents in any indictment we would put forward. We also had clear-cut evidence of the forced deportations of hundreds of thousands of people—something that was still ongoing. With this information in hand, we had an adequate crime base for bringing an indictment.

The question remained, however: an indictment against whom? The evidence of a crime base was clear, but the challenge, as is almost always the case with war crimes, was in linking these crimes either with the direct perpetrators or with their political and military superiors. Unlike crimes that occur in a domestic setting, where perpetrators are often known to the victims or witnesses, or at least have links to the location where the crime was committed, the perpetrators of war crimes are frequently from elsewhere, often from military or paramilitary units that are moving quickly through an area. As a result, even identifying the perpetrators—let alone getting evidence sufficient to prosecute them—can be extremely difficult.

Yet this is the more straightforward part: Linking an incident in some obscure village to the perpetrators' superiors—who order or condone the atrocities but are often hundreds of miles and several layers of bureaucracy removed from the crimes themselves—requires a combination of factual evidence and a provable chain of legal or practical responsibility. It was this high threshold for establishing culpability that Milošević had always relied on to protect himself from criminal liability during the wars in Croatia and Bosnia, and it had always worked. Until Kosovo.

### **III. The Tide Turns for Milošević**

For most observers outside the ICTY, particularly those in the former Yugoslavia, it was beyond comprehension that Milošević had not been indicted for war crimes before 1999. Most people around the world saw Milošević as the principal architect of the wars in the Balkans and, as the authoritarian ruler of Serbia, the one ultimately responsible for the crimes committed by Serb forces first in Croatia, then in Bosnia, and finally in Kosovo—"the Butcher of the Balkans," as the Introduction notes. His swaggering contempt for those who sought to lessen human suffering in the region and find just solutions to its problems, combined with his seeming ability to turn the violence on or off, only compounded the view of him as the one in charge.<sup>9</sup> As someone who followed events in the former Yugoslavia very closely, I was sympathetic to these views, as was almost everyone I worked with in the Prosecution.\* Yet without evidence of culpability that can stand up to scrutiny in a courtroom, this belief alone was insufficient for initiating a prosecution.

Since 1991, when the first significant war crimes were committed in Croatia—crimes that were magnified on an even larger scale during the three years of conflict in Bosnia—Milošević had been a master at protecting himself from liability. Operating behind the complex governmental structures of the FRY and Serbia, Milošević actually avoided having clear de jure responsibility for the actions of the military or police units perpetrating crimes, because they fell under the legal authority of other officials.



From May 1989 until July 1997—including the entire period of the Croatian and Bosnian conflicts—Milošević had served as president of Serbia. During the period of Yugoslavia's dissolution, his influence extended far beyond Serbia, but each of the other constituent republics had clear de jure authority over its domestic affairs, particularly in the area of law enforcement. Similarly, primary responsibility for defense rested with the federal government.<sup>10</sup> As fighting intensified in Croatia in the fall of 1991, the JNA increasingly came to represent parochial Serb interests; Milošević had tremendous de facto influence over this transition, and—as the SFRY leadership structures weakened—over the JNA itself. Nevertheless, as president of one constituent republic, he still had no legal authority over the JNA, which answered to the SFRY Presidency,<sup>11</sup> a body on which Serbia was separately represented.<sup>12</sup>

After 1992, the newly formed FRY enacted a similar division of responsibilities, with the federal government continuing to control defense and foreign affairs and the two republics—Serbia and Montenegro—dealing with domestic affairs. As president of Serbia, Milošević had authority over the police forces of the Republic of Serbia, and now sat ex officio as one of three members of the VSO that had responsibility for national defense, but technically—legally—did not have clear or exclusive authority over the federal military forces, now renamed the *Vojska Jugoslavije* (Army of Yugoslavia or VJ), which were commanded by the president of the FRY.<sup>13</sup>

Thus, when the wars began in 1991, Milošević had no de jure authority over the JNA, the primary fighting force engaged on the Serbian side in Croatia. When the JNA ostensibly withdrew from Serb-occupied areas of Croatia in late 1991, much of its equipment and personnel were left behind to form the *Srpska Vojska Krajina* (Serbian Army of the Krajina or SVK)—a force theoretically under the control of Croatian Serb leaders. Likewise, the JNA fought at the outset of the war in Bosnia in 1992, but after its formal withdrawal in May, military units, equipment, and personnel remaining in Bosnia were simply detached from the JNA and were reconstituted as the *Vojska Republike Srpske* (Army of the Republika Srpska or VRS)<sup>14</sup> under the legal authority of the RS leaders, not Milošević. Although Milošević clearly exercised great influence with the breakaway Serb governments in both Croatia and Bosnia,\* they and their

military forces remained outside his de jure control. The VJ—over which he had a degree of partial de jure control—would not have a direct and visible role in hostilities again until 1999, in Kosovo.

A number of other crimes in Croatia and Bosnia could be linked to paramilitary forces from Serbia itself. These paramilitary units, often styled as volunteers, fell outside any official chain of command, making it even more difficult to link Milošević or other senior officials with their actions. Although evidence eventually emerged of the role played by Serbian security services in arming, training, and even directing these irregular forces, little of that evidence had come out by the mid-1990s. As a result, although everyone suspected—believed—that Milošević had some degree of control, or at least influence, over the irregular forces that perpetrated some of the worst atrocities in Croatia and Bosnia, the provable linkages back to him were well camouflaged.

At the ICTY, there was little doubt in our minds that although Milošević may not have had strict legal authority over Serbian units involved in crimes in Bosnia and Croatia, he did exercise de facto authority over them. To anyone who followed what was happening in the former Yugoslavia, it was clear that Milošević was the one calling the shots. To prove this, however, and to take it one step further—to show that his control was such that he was aware of what was happening in some obscure village in Bosnia or Croatia—had been extremely problematic. Throughout the 1990s, Milošević was usually quite guarded in what he said to outside interlocutors, being careful not to convey anything that would directly implicate him in crimes or link him to perpetrators. There were instances when he accidentally said more than he should have, but these were few and far between, and were really not adequate enough to build a comprehensive case against him. Without outside witnesses, the ICTY was left to rely on insiders: individuals in the government or military of Serbia, or the FRY who could testify that Milošević was the ultimate decision maker. But with Milošević still firmly in power, getting insiders to talk to the ICTY had been impossible.

Although these evidentiary challenges were significant and may not have been surmountable until Kosovo, it is also true that the ICTY had really not done enough to develop the evidence against Milošević prior to 1999. This was partly due to the general approach adopted by the Prosecution and the organizational structure that approach engendered.

During its first two years of operation—the period that overlapped with the wars in Bosnia and Croatia—the Prosecution’s focus was on specific crimes, standing on their own. This was driven by several factors, most important being the need for the Prosecution to develop evidence of the crime base in those two conflicts. Although most of the crimes that ultimately ended up being charged in indictments were already known as a result of open-source reporting, full-scale investigations were necessary to develop the evidence to the point at which formal charges could be brought.

This information had to be developed from the ground up. In order to do this, the Prosecution’s Investigations Section was structured around geographically and ethnically oriented investigative teams. For example, the investigative team on which I served as the Trial Attorney was responsible for investigating Serb-perpetrated crimes in Croatia. Other teams, particularly those responsible for Bosnia, were often limited in their focus to much smaller areas, at times even to a single municipality. Moreover, different teams were set up to investigate crimes committed by different perpetrator groups—Muslims, Serbs, Croats, and later Macedonians and Albanians—such that two different teams could be looking at crimes committed in the same location. Although this focus and organizational approach were understandable at the outset, not enough effort was made over time to tie these disparate investigations together and to develop a more comprehensive understanding of how crimes at ground level were linked back to individuals in senior leadership positions, such as Milošević. In effect, each of these investigative teams operated in isolation with relatively little strategic guidance from the Investigations Section leadership.

The result of this approach was that the Prosecution’s legal and investigative resources were applied to individual cases without a strategic vision or a clear concept of how to advance the investigations to the next level—that is, to encompass the responsibility of senior leaders. Moreover, the geographical organization gave investigative and prosecutorial teams incentives to assign ultimate responsibility for crimes to actors within their region, in ways that positively discouraged thinking about connections across or above regions.\* Some investigations and trials involving relatively minor figures garnered many more resources than they should have. Although the accused in these cases may have been

responsible for some horrendous crimes, they were not of a level that they should have forestalled investigations of individuals such as Milošević—the key actors whom the Tribunal was expected to prosecute. This failure, then, by the ICTY to shift its approach earlier to a more strategic perspective and to apply resources accordingly in a coordinated fashion was a factor in the delay in Milošević's being indicted.

Still, I can say with confidence that this was the result of institutional inertia—an unwillingness to revamp a structure and approach that had been erected over the preceding five years—rather than of political motivation. Outside observers who have attributed this delay to a political calculus or to the effects of political pressure brought to bear against the Prosecutor to pursue one course or another—speculations or conspiracy theories of that sort—simply are not supported by what those of us in a position to know saw occurring.

Whatever the institutional shortcomings, however, with Kosovo the whole situation changed. Recognizing the enormity of what was happening, the leadership in the Prosecution—Arbour of course, but also Deputy Prosecutor Graham Blewitt, Ralston, and Reid—marshalled the legal and investigative resources necessary to build a case against Milošević. More significant, perhaps, was that fact that for the first time during the wars, Milošević was legally in a position of command over the individuals perpetrating the crimes. In July 1997, he had shifted from his role as president of Serbia to become the president of the FRY,<sup>15</sup> and in this new role, he became the Supreme Commander (*Vrhovni komandant*) of the VJ, a position he held until his fall from power in October 2000. We believed this also gave him operational authority over Serbian and FRY police units during a state of war, which covered nearly the whole period of the Kosovo conflict.<sup>16</sup> This formal authority greatly simplified the construction of a case against Milošević, because we knew from our interviews and other information that the killings and deportations were being committed by a mix of military and police units.

Also, where Kosovo was concerned, Milošević was not as guarded in his dealings with outside interlocutors. The carefully constructed language he had used when talking about Croatia and Bosnia was dropped, replaced with brash, aggressive statements regarding Kosovo. He still refused to admit that Serb forces were responsible for crimes, but he was much more assertive of Serbia's right to do whatever it felt necessary in Kosovo.



Because Kosovo was a province of Serbia, he viewed the situation there as a purely domestic matter in which outside interference would not be tolerated. In discussions with foreign diplomats and military officials, Milošević was more open than he had ever been in the past about his direct role in the current conflict in Kosovo, acknowledging his authority over the forces operating there.

Still, once the NATO air campaign began, and the worst atrocities started occurring, it was difficult to substantiate reports of specific incidents because there were virtually no outside observers left in the province. For the few international interlocutors still talking to Milošević at that point, there was little concrete evidence available with which to confront him. The one aspect that was obvious to everyone was the mass exodus of ethnic Albanian civilians from Kosovo, who came to neighboring countries in the hundreds of thousands with stories of the violence that had been directed toward their community and of forced expulsions from their homes. Milošević dismissed it all as Albanian lies or misrepresentations of incidents where the supposed victims had actually been combatants engaged in conflict with legitimate Serbian forces. As to the expulsions, he waved those off as well, saying that those leaving Kosovo were doing so voluntarily, fleeing the NATO bombing.

Milošević repeated this explanation when he met with the Kosovar Albanian leader, Ibrahim Rugova, in Belgrade during the bombing. Milošević had had little direct contact with Albanians in the past, but with the war in full swing, no apparent way to end the NATO bombing campaign, and many people speculating about Rugova's well-being, Milošević had summoned Rugova to a meeting—their second in less than a year<sup>\*</sup>—and had dispatched a car to pick him up. After the meeting, Rugova was allowed to leave Serbia, and he was given refuge by the Italian government.<sup>17</sup> Shortly after he arrived in early May 1999, I met him in a Renaissance villa in the hills outside Rome, interviewing him in a room with 16th-century frescoes on the ceiling—a far cry from the chaos he had just left in Kosovo, and from which I had recently come in Albania. His chief of staff, Adnan Merovci, who had accompanied him to the meeting with Milošević and who had come with him to Rome, was in the meeting as well. Merovci had taken detailed notes of the meeting with Milošević and was able to recount in great detail what had been discussed.

What was significant about Rugova's meeting with Milošević was that Rugova had been on the ground in Kosovo after the NATO bombing campaign had begun and as the violence against civilians intensified, and thus had been able to give Milošević a firsthand account of crimes being committed by forces under his command. This differed from what outside interlocutors, with no access to Kosovo itself, could tell Milošević. When they raised reports of crimes, Milošević generally debunked the allegations as exaggerations or propaganda; with Rugova, he had a harder time doing this, as Rugova was able to cite specific incidents, and Milošević would answer by saying that he would look into them—a shift from his usual posture of denial that such things were occurring.<sup>18</sup> As I left the meeting with Rugova and Merovci, and drove back to the Rome airport, I felt that we had finally crossed the threshold of direct evidence showing Milošević's knowledge of the violence being perpetrated by forces under his command and of his de facto supervisory role in Kosovo. Rugova and Merovci had also supplied compelling evidence against two other individuals who would ultimately be charged with Milošević—Serbian President Milan Milutinović and FRY Deputy Prime Minister Nikola Šainović, Milošević's special representative for the Kosovo situation. Rugova and Merovci had had direct contact with both men and were thus able to describe the extent of their personal engagement in Kosovo.<sup>19</sup>

Although the information from Rugova and Merovci was more pointed than that coming from Milošević's other international interlocutors, by early May we had compiled a wide array of statements by Milošević—through interviews with individuals who had met with him and from other sources such as television reports—that corroborated his direct supervisory role over events in Kosovo. Combined with what we had been able to establish regarding his de jure responsibilities, we felt confident that we had by that point a prosecutable case against Milošević.

Ultimately, the success of investigations against Milošević and the whole Belgrade leadership may have been dependent on the unique situation in Kosovo—specifically Milošević's changed de jure role and the more open and direct exercise of Serbian power there. The final, critical element was the cracking of his regime, which paved the way for insider witnesses to cooperate with ICTY investigations and also for Serbian authorities to turn over incriminating documents.<sup>20</sup> But this came later, of

course, which meant we could not rely on information from Belgrade as we prepared a trial-ready indictment.

## **IV. The Indictment**

As we had done with the investigation, Paterson and I initially divided up responsibility for drafting the indictment. I would focus on the overall factual background section, the facts of the incidents alleged in the particular charges, and the charges themselves; Paterson would focus on the sections on the accused and the assertions of criminal responsibility. As our work progressed, there was a fair bit of overlap between these breakdowns of responsibility, and we were also assisted in our drafting efforts by the analysts working on the case.

Although Milošević had become the principal target of the investigation, we knew that other senior Serbian officials shared responsibility. The inner workings of the Serbian leadership structure were still quite opaque to us at that point, however: We did not have the advantage of any insider witnesses who could shed light on how individuals with formal legal authority actually exercised their power, or how they interacted with others ostensibly above or below them in the chain of command. We were able to establish the *de jure* roles of key figures, and through the testimonies of various outsiders who had been their interlocutors, to corroborate their *de facto* roles. There was, however, an acknowledged degree of inexactitude when we made assertions as to how each of the individuals ultimately charged actually fit into the Serbian hierarchy of power.

We therefore adopted a cautious approach in charging, in which we gave greater weight to their *de jure* roles, but also took into account the totality of the circumstantial evidence about the influence they exercised in Kosovo. One consideration was ensuring that those who had clear-cut *de jure* authority over any of the military or police forces linked with crimes would be charged. In this way, we hoped to avoid a scenario in which someone we failed to charge—and who actually had *de jure* command status—would become the scapegoat for everyone who had been charged.

We were quite confident we could prove that those at the most senior leadership levels in the Serbian and FRY governments had knowledge of what was occurring on the ground in Kosovo, or that they certainly should have from their subordinates. The extent of the crimes and the fact that they were occurring in such a concentrated period of time made it very difficult for anyone with *de jure* responsibility to plead ignorance. A harder question arose when we started going down the chain of command to those in charge of operational field components. Although we knew the identity of most of the military and police units operating in Kosovo, we were not clearly able to establish which specific units were in which locations at which points—and therefore, we could not say with specificity which units were responsible for particular crimes. Much of that evidence would come later, and later charges would reflect that more precisely; as we drafted this indictment, however, we focused on individuals who had authority over all military or police units operating in the Kosovo theater.

Thus, under the theory of superior responsibility, we charged Milošević in his *de jure* role as president of the FRY and Supreme Commander of the VJ, and as the one in *de facto* control of Serbia's governmental structures. We also charged President Milutinović, VJ Chief of the General Staff Dragoljub Ojdanić, and Serbian Interior Minister Vojislav Stojiljković under this theory. Milošević and these other three individuals were also charged under the theory of individual criminal responsibility, as was Deputy Prime Minister Šainović (whose formal legal liability was different—see endnote<sup>21</sup>).

As we began finalizing decisions on which crime incidents to charge, we focused on those for which we had extremely solid evidence—numerous independently corroborated witness statements, or corroborative physical or documentary evidence. Reports of additional atrocities continued to come in every day, and many of them seemed credible; nevertheless, we felt that we had to set a cutoff point and go with only those crimes for which we had conclusive evidence at the point at which we were otherwise ready to present an indictment. We ultimately settled on seven incidents of mass killing: Račak on 15 January 1999; Bela Crkva (Bellacerka) on 25 March; Velika Kruša (Krusha e Madhe) and Mala Kruša (Krusha e Vogel) on 26 March; Đakovica on 26 March; Crkolez (Padalishte) on 27 March; Srbica (Skënderaj) on 27 March; and the Ćerim (Qerim) district<sup>22</sup> of Đakovica on 2 April. In all, these incidents accounted



for over five hundred murders, of which 341 victims were identified by name in the indictment. These killings were charged as crimes against humanity and as violations of the laws or customs of war.\* Additionally, we charged the five Accused with crimes against humanity for the forced deportations of 740,000 Kosovar Albanian civilians, citing the facts of expulsions that had occurred in 10 different municipalities. Finally, we charged them with crimes against humanity in an overarching persecution count, which encompassed the totality of Serbian actions against the civilian population in Kosovo.<sup>23</sup>

One charge conspicuous by its absence was genocide. When the indictment was eventually announced, there was a very negative reaction among Kosovar Albanians, and some degree of surprise by international civil society organizations, that we had not charged this crime.<sup>24</sup> There were different views in the ICTY at the time as to whether it should be included or not, and it ended up being a subject of exhaustive discussion. Ultimately, a consensus was reached—and endorsed by Arbour—that although we had compelling evidence of a number of incidents, it was difficult for us, from outside, to paint a complete picture of what had occurred in Kosovo. We fully anticipated that we would get access to the ground once the conflict was over and that we might then be able to develop a clearer idea of what had occurred throughout the province and what had been the intent of the perpetrators.

To some extent, the issue revolved around the number of deaths. Although there is no threshold level necessary to establish the intent to “destroy, in whole or in part, a national, ethnical, racial or religious group,”<sup>25</sup> certain conclusions can be drawn from the numbers of people who are murdered and the scale of the crimes.<sup>26</sup> In May 1999, we knew that a number of mass killings had occurred, and we felt quite certain that there were others we did not yet know about. Nevertheless, we could not be absolutely sure, so we held off on charging genocide until we could construct an irrefutable crime base. It was a conservative approach,<sup>†</sup> but we undertook it recognizing a genocide charge would be so explosive that we wanted to have all of the evidence in front of us before deciding to go forward with it—something we just were not in a position to do while the conflict was still ongoing and we did not have access to Kosovo. In the

event, although we did later gain extensive access to the area for our investigations, no genocide charge for Kosovo ever was filed.

By mid-May, we had completed a draft of the indictment and had compiled the supporting evidentiary materials. Following ICTY practice, we presented our draft indictment and the evidence we were basing it on to a group of attorneys from the Prosecution. Paterson and I presented our case to the assembled lawyers and then spent several hours explaining how the allegations in the indictment were supported by the evidence. Although indictment reviews were never a particularly enjoyable experience for the prosecutors presenting a case, they were extremely useful exercises. By bringing in fresh sets of eyes to examine the responsible attorneys' work product, these reviews often revealed holes in evidentiary theories or even simple factual errors that might have been missed by the lawyers who had been completely enmeshed in the case.

After the indictment review, Paterson and I met with Arbour at length and discussed the recommendations that had come out of the review panel. She accepted some of them, and had us incorporate those changes into the final indictment; others she rejected, however, exercising her authority as the final arbiter. In the end, the version that emerged from the indictment review and from the discussions with Arbour was not significantly different from what we had initially put forward—the theory of liability, the specific charges, the choice of the five Accused. As we revised the indictment, though, we also completed the process of assembling the voluminous supporting evidentiary materials that were to be submitted with the indictment to the confirming judge. In effect, all allegations or statements of fact in the indictment were corroborated by items in the supporting materials, which were referred to in an annotated version of the indictment supplied to the judge. The process of compiling all of this material into an accessible format, of cross-referencing information, and of reconfiguring things after the inevitable revisions to the draft indictment was a laborious one.\* As we were preparing to issue the first indictment of a sitting head of state, we were particularly mindful of the pressure to get it all right.

On Saturday, 22 May, Paterson and I worked through the day finalizing the package. Into the evening, we were still making changes in the indictment and every shift in language, no matter how minor, necessitated a further discussion with Arbour. We ultimately arrived at a final version

late that evening and Arbour signed it, with Paterson and me looking over her shoulder.

The next morning, I delivered the indictment and supporting material to the confirming judge, David Hunt of Australia. I spent an hour or so walking him and his legal officer through the indictment and the supporting materials, making sure that he was clear on where references to every evidentiary item could be found. After reviewing the indictment package, Judge Hunt signed the confirmation order the following day, 24 May. At the request of the Prosecutor, he also signed orders for the arrest and freezing of assets of the Accused, which were transmitted to all of the Member States of the United Nations and to Switzerland. Finally, the judge signed an order keeping the indictment under seal until Thursday, 27 May.<sup>27</sup> This was done at our request, so that Arbour could inform certain international organizations and governments with people on the ground in Serbia that this indictment was coming, giving them time to take precautionary measures in the event that they felt any of their staff might be put in harm's way as a result. Interestingly, Arbour had felt strongly that she needed to have a final signed and confirmed indictment before giving any warning or notice of what was about to happen, because she anticipated that some governments might object and pressure her to delay the indictment. If the indictment was already finalized, they would have no choice but to accept it as a fact.

Ironically, when the indictment was announced, there was a lot of speculation in the media, and particularly in Serbia, that the ICTY had acted under pressure from NATO governments to charge Milošević. In fact, the opposite was true: As Arbour had correctly anticipated, there was actually a fair degree of consternation among some NATO governments that saw the indictment as an impediment to ending the war.<sup>28</sup> Rather than viewing it as something that increased pressure on Milošević and therefore was in their interest—and that they had desired—they feared an indictment of Milošević would encourage him to refuse to negotiate an agreement ending the conflict. As it turned out, however, the indictment had no such effect. Fewer than three weeks later, the FRY entered into the Kumanovo agreement, ending the war and committing to a withdrawal of Serbian forces from Kosovo.<sup>29\*</sup>



Kosovo provided the perfect scenario for the ICTY to finally establish Milošević's culpability and to indict him for crimes against humanity and war crimes. The combination of his changed *de jure* status and his own brashness was his undoing. In the aftermath of the Kosovo war, although Milošević remained in power, he was clearly weakened. His efforts to portray the Kosovo war as a victory fell on deaf ears among most in Serbia, especially as Kosovo had effectively been partitioned off and placed under United Nations' administration. Virtually all vestiges of Serbian authority in the province had disappeared, and control had been taken over by NATO troops.<sup>†</sup> In this atmosphere, and with the Serbian economy in shambles, Milošević's authority began to evaporate; when he foolishly called elections in October 2000 under new rules allowing for direct election of the FRY president, he was defeated by a newly unified opposition.<sup>‡</sup> His efforts to manipulate the results and cling to power failed and, facing a growing public revolt, he fell from power—an indicted war criminal.

Although Kosovo proved to be Milošević's undoing from both a political and legal perspective, it also opened the door to additional criminal charges. With his grip on power gone, some with inside knowledge of Milošević's regime and of his personal role in the Balkan wars began to talk. Information that had been zealously guarded during Milošević's rule slowly began leaking out, and this provided the evidence necessary to bring the follow-on indictments against Milošević for crimes in Croatia and Bosnia.<sup>§</sup> And, less than a year after his fall from power, the government of Serbian Prime Minister Zoran Đinđić took the difficult decision to transfer Milošević to the Tribunal, where he ultimately went on trial for crimes committed in Kosovo, Bosnia, and Croatia.<sup>¶</sup>

Some criticize the Tribunal for not issuing indictments against Milošević earlier, when the wars in Croatia and Bosnia were still ongoing. Whatever the merits of that view, the *Kosovo* investigation and indictment are not subject to the same criticism. They were undertaken with speed and attention to events unfolding in real time, marshalling the Tribunal's considerable resources to take advantage of a unique set of circumstances. Moreover, to the degree it may also have weakened Milošević's rule and made his appearance at the Tribunal more possible, the initial *Kosovo* indictment—though it addressed only the last of the wars he directed—advanced the project of bringing Milošević to justice for all his crimes.



## 6

# Real Justice or *Realpolitik*? The Delayed Indictment of Milošević

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*The idea that Slobodan Milošević might be responsible for crimes in the violent dissolution of Yugoslavia was not an unusual notion. So the fact that Milošević was not indicted until 2001 for crimes committed in Croatia and Bosnia as early as 1991—crimes whose scope and violence were shocking and notorious—is, to say the least, perplexing. This chapter examines that delay, which developed in three phases: the effective impunity during the early war years when peace plans were being repeatedly negotiated; the withdrawal of implicit protection from the Bosnian Serb leadership with the consolidation of a “Milošević strategy” in 1995; and finally the abandonment of that strategy in the Kosovo crisis, which made indictment seem desirable. The delay thus resulted from a pervasive but misplaced logic of Realpolitik, which—believing that it is precisely the most dangerous and violent offenders who are most critical to the peacemaking process—posited a false dichotomy between the pursuit of peace and the pursuit of justice. The effect of this approach was to starve judicial mechanisms of funding, information, and critical support, pressures to which the ICTY Prosecution inevitably responded.*

# **I. Introduction: A Long Journey, and a Perplexing Question**

A trial is the culmination of many events: the discovery of facts, channeled through a formal legal process; an investigation to gather evidence; ultimately, the issuance of criminal charges. This process is commonplace in domestic systems, but is more complex and difficult to understand in international trials, which historically have been ad hoc, conditioned by political considerations and contingent factors that are seldom part of the public record. This was certainly true of the convoluted chain of events that led to the indictment of Milošević—or rather, that did *not* lead to his indictment. Given that he was ultimately charged with crimes committed as early as 1991—crimes whose scope and violence were shocking and notorious—why no indictment was issued against Milošević between the ICTY’s establishment in 1994 and the Kosovo war in 1999—nor even, apparently, an investigatory file opened\*—is, to say the least, perplexing.

The idea that Milošević might be responsible for crimes in the violent dissolution of Yugoslavia was not an unavailable or even unusual notion; in fact, it had occurred to a great many people. In late 1992, for example—in the waning days of the Bush administration, but still early in the war in Bosnia—Lawrence Eagleburger gave his famous “naming names” speech, in which he announced that the United States had identified Milošević, among others, as a suspected war criminal who should be tried for his actions.<sup>†</sup> Other actors likewise made the case that Milošević could, and should, be charged with crimes for his actions in Croatia and Bosnia.<sup>1</sup>

There was also an institutional framework that made an indictment thinkable. In 1992, a few months before Eagleburger’s speech, the Security Council had established a Commission of Experts, which investigated and first reported on war crimes in the former Yugoslavia in 1993, as well as issuing a Final Report in 1994;<sup>2</sup> before the Bosnian and Croatian wars were over, a functioning Tribunal was in place, with jurisdiction that clearly allowed for prosecution of senior political figures such as Milošević. These institutions constituted a breakthrough in international criminal law—the missing link, in a sense, between Nuremburg and Tokyo

and the post–Cold War world, in which tribunals have proliferated. ICL had reappeared on the scene of international relations.

But this revived pursuit of ICL was not without political limitations. As the story of Milošević’s much-delayed indictment shows, *Realpolitik* remained paramount: The pursuit of ICL had to be subjected to the perceived imperatives of international diplomacy.<sup>3</sup> The journey to indictment was long because of divisions between the major powers—divisions based on a misplaced belief that peace and justice are incompatible and that the only possible avenue to peace requires a moral equivalency between the warring parties—and the concomitant unwillingness of those powers to support a judicial process as part of peace negotiations. A study of that journey shows us that when peace is pursued at the expense of justice, the world is left without either. Those responsible for committing atrocities will continue to commit them, perceiving—accurately—that it is precisely their capacity for atrocity that makes them valuable peace partners, in a perverse cycle of abuse and accommodation. Offers of impunity and bluffs of prosecution—the tactical legal tools of *Realpolitik*—can create a veneer of peace and justice, but not the real thing.

## **II. Pursuing Peace, and Its Price: The Period of Non-Investigation**

### **A. Interests other than justice: Crippling the Commission of Experts**

The journey to Milošević’s indictment started with Resolution 780, creating the Commission of Experts,<sup>4</sup> but even the Resolution had its own political history that affected what followed. The graphic, well-publicized incidents of concentration camps and ethnic cleansing—so redolent of the Second World War and coming so soon after the end of the Cold War, with the renewed florescence of interest in internationalism and the UN<sup>5</sup>—provided an impetus to treat the violence not only as a political or diplomatic problem, but as a problem of law. During the summer of 1992, British and French media released reports of detention camps, provoking

public outrage and resulting in the London Conference, at which representatives of 20 states and leaders of the former Yugoslav republics met to resolve the violence.<sup>6</sup> In September, Germany's foreign minister, Klaus Kinkel, first proposed before the UN General Assembly that a tribunal be established;<sup>7</sup> although this was not done for another year, the Security Council—which had already characterized its concerns about the conflict in terms of international humanitarian law<sup>8</sup>—created the Commission in October.<sup>9</sup>

In negotiations, the United States pressed for an active Commission capable of investigating the ongoing atrocities, but the United Kingdom and France had no intention of actually creating an effective Commission: These countries insisted that the Commission be funded only from existing UN resources, instead of providing funds in the Resolution.<sup>10</sup> This effectively reduced the possibilities for independent investigation and made difficult the collection and preservation of information that could have been used as evidence in indictments.<sup>11</sup>

Why were two of the Commission's putative supporters so opposed to it in practice? The U.K. and France resisted an active Commission for fear it would adversely affect peace negotiations.<sup>12</sup> At the London Conference, Lord David Owen, the former British Foreign Secretary representing the European Union, and Cyrus Vance, the former U.S. Secretary of State representing the UN, had been given responsibility for negotiations. Lord Owen was eager to obtain a political settlement, even at the cost of justice for the victims; an activist Commission might reveal information embarrassing to the leaders with whom he was negotiating, preventing the kind of political horse trading that had achieved peace in the past.<sup>13</sup> Owen's thoroughgoing realism—and, implicitly, his accommodationist assumptions about the power of local actors—is evident in a notorious moment of rhetorical deflation when, in his capacity as European Community negotiator, he cautioned the populations whose future he was negotiating, "Don't, don't, don't live under this dream that the west is going to come and sort this problem out. Don't dream dreams."<sup>14</sup>

Further motivating the British and the French to minimize any potential provocation of Belgrade were the two countries' large contingents in the United Nations Protection Force (UNPROFOR).<sup>15</sup> With its peacekeeping mandate, UNPROFOR lacked adequate artillery, armor,



and air cover; forces were broken into small units, making them vulnerable to local forces. They were, for all practical purposes, held hostage to the war.\* But the troops were nonetheless there, allowing the U.K. and France to exert influence over the UN operation, which they did both to affect the debate over the Commission, and later to persuade other members of the Security Council to vote in accord with their draft resolutions regarding UN involvement in the former Yugoslavia.†

Beyond their most immediate concerns about force protection and a negotiated peace, the British and French had larger geostrategic interests that affected the pursuit of judicial investigations. Both wanted to gain influence in the post–Cold War world in which the United States was the dominant power and unified Germany newly resurgent. A positional logic therefore encouraged them to oppose what Germany and the United States supported, and their military commitments gave them the political capital to counterbalance the German and American role.<sup>16</sup> This is not to say the French and British were unconcerned by the reports of ethnic cleansing or unaware of Milošević’s role—indeed, their peace negotiations were implicitly premised on recognition that leaders such as Milošević were in a position to control the violence on the ground. But their strategic interests provided them further reasons to oppose an active Commission that might have focused blame on the senior Serb leadership, whom they considered essential to negotiations that, they believed, would both bring peace and further those interests.

For their part, the United States and Germany had their own reasons to support the Commission’s work. President Clinton had not fulfilled (admittedly ambiguous) campaign promises concerning U.S. intervention in the former Yugoslavia, which Secretary of State Warren Christopher opposed.<sup>17</sup> Supporting the Commission was a way of showing that the United States was doing something and had moved beyond the position enunciated by former Secretary of State James Baker, who had summarized American policy in his oft-cited statement: “[W]e don’t have a dog in this fight.”<sup>18</sup> In addition, UN Ambassador Madeleine Albright was personally invested in perpetuating the legacy of Nuremberg.<sup>19</sup> German support, similarly, was in part a function of its domestic political culture and foreign policy goals; Germany’s eagerness to recognize Croatian and Slovenian independence and resist Serbian aggression likely

relates to its own image after World War II.<sup>20</sup> More generally, to the degree the Commission was likely to reveal large-scale Serb criminality, it served the interests of states seeking to counter Serb hegemony and support their own newly independent clients in the region. \*

Serbia had a powerful supporter in Russia, a traditional ally but also one with economic interests, including being the primary arms suppliers to the Serbs.<sup>21</sup> Russia opposed any interventionist precedent as it was engaged in its own conflict in Chechnya and was concerned about the fragility of its own federation.<sup>22</sup> Thus although Russia did not oppose the creation of the Commission, it had little enthusiasm for it. Other European states had strategic and parochial interests that hampered the formation of consensus around active investigation.<sup>23</sup>

All of these external actors had a stake in the final outcome, and none wanted an expansion of the war; all were therefore sympathetic to, or at least acquiescent in, peace negotiations as a preferable option. Peace between Serbia and Croatia was possible, but Bosnia was a more difficult problem, and the negotiators' proposals to divide control reflected the seemingly incompatible agendas of the warring parties.<sup>24</sup> In this context, a robust criminal investigation was inconvenient for those parties most invested in finding a negotiated solution: Bosnia could not appear to be the victim of ethnic cleansing, systematic rape, and crimes against humanity, because a victimized nation could hardly be sacrificed to the aggressors.<sup>25</sup>

## **B. Evidence available: What the Commission's investigations revealed**

Still, although the Commission of Experts had little support, it had a mandate. With grants from foundations, the Commission was able to begin its work with a volunteer staff of attorneys and law students; later, a number of states established a UN trust fund to pay for exhumations and interviewing.<sup>†</sup> Equally critically, by the time the Commission was established, the wars had begun to settle into clear, in some areas even static patterns. The fronts in Croatia had largely stabilized. In Bosnia, the situation was still quite fluid, but many of the fronts were delineated early on and remained relatively fixed. This meant that investigation was marginally more possible.

In this context, the Commission set about exhuming mass graves (with the help of 35 Dutch soldiers), performing forensic examinations, and interviewing refugees.<sup>26</sup> A 40-member all-female team of attorneys, mental health specialists, and interpreters interviewed 223 female rape victims and witnesses.<sup>27</sup> One commissioner compiled a report on ethnic cleansing in Prijedor, based on some four hundred interviews with witnesses.<sup>28</sup>

These investigations began in the fall of 1993, but in December, the Commission was notified by UN Legal Counsel that its mandate would be terminated on 30 April 1994.<sup>29</sup> Thus, all the evidence based on on-site investigation was to be completed in about six more months.<sup>\*</sup> This timetable prevented the examination of many rape witnesses and the exhumation of the Vukovar mass grave site due to the Croatian winter.<sup>30</sup> It is possible this was done because by then the Tribunal had been established and the UN wished to avoid redundant institutions.<sup>31</sup> Still, it was not clear to me at the time why the mandate of the Commission was terminated so quickly—after all, the ICTY, itself barely funded, was also adversely affected when the Commission was arbitrarily cut off while there was still work to be done—and to this day I cannot explain it.<sup>32</sup>

Still, even those abbreviated investigations indicated that Owen's concerns were justified. What those investigations revealed—amid details of killing, imprisonment, deportation, rape on all sides—was a predominance of crimes committed by Serb forces, in consistent patterns pointing to the FRY. Milošević's fingerprints and footprints were all over the wars in Croatia and Bosnia; all of the evidence suggested his role was either as a mastermind of the overall strategy or the one approving specific aspects of it.<sup>33</sup>

The evidence in the Commission's Final Report showed that the wars in Croatia and Bosnia involved policies of ethnic cleansing and of systematic rape by Serb forces,<sup>34</sup> and that those forces had operated with substantial support from the FRY. Throughout the Bosnian war, the JNA and then VJ had been closely involved, supplying the VRS with weapons and ammunition; the VRS itself was commanded by former officers of the JNA and VJ—including senior officers seconded from Belgrade, where Mladić himself was still listed on the officer rolls.<sup>†</sup> This was one of the



early ploys employed by Milošević as a way to retain plausible deniability for Serbia's involvement in the Bosnian war, but it would have been impossible for the Chief of Staff of the VJ to supply the VRS and Serb paramilitary groups so extensively without Milošević's knowledge.

Of particular note is the statistical study the Commission made on the shelling of Sarajevo.<sup>35</sup> The Annexes of the Final Report note on a daily basis the number of shells fired, targets hit, and casualties produced. Part of the study tracked the daily shelling as against political negotiations: During the ongoing Vance–Owen negotiations, shelling would go down as negotiations progressed positively; when agreements were reached at Geneva, New York, or Paris, Serb shelling would drop to nothing. Conversely, when negotiations failed, the rate would escalate, sometimes to three thousand shells a day. The correlation between the rate of shelling and political negotiations involving all three sides—often Milošević, Tuđman, and Izetbegović or their representatives—could not have occurred if there was no direct connection between Milošević's and the Bosnian Serbs' positions during these negotiations, with the shelling serving as an element of punishment or reward that the Serbs inflicted on the Bosniaks.\*

All of this was carefully documented in the Commission's Final Report—its 3,500 pages of Annexes, 74,000 pages of documents, 300 hours of videotape, and 3,000 photographs—which was made available to the Prosecution of the new ICTY. At the time, the Prosecution claimed that the information may have been unreliable due to chain of custody or witness reliability issues,<sup>36</sup> but even if this were true, the information in these documents could have provided the foundation for new investigations. Taken as a whole, it provided a comprehensive picture of Milošević's responsibility, and could have formed the basis for an indictment—but this did not happen.

### ***C. Realpolitik redux: Constraints on an effective ICTY***

Controversial as the Commission's investigative mandate was, it did not provide any mechanism to prosecute individuals or even recommend prosecutions. Rather, Resolution 780 requested the Secretary General, "to report to the Council on the conclusions of the Commission of Experts and to take account of these conclusions in any recommendations for further



appropriate steps[.]”<sup>37</sup> By early 1993, the deepening crisis in Bosnia and the Commission’s interim report had paved the way for just such a mechanism. As expectations for Owen’s peace option waned, there was renewed pressure to take what was seen as the logical next step. The establishment of the Tribunal that May was a further victory for the revival of ICL—but one that also shows the continued influence of *Realpolitik* in prioritizing peace over justice.

States that had combined rhetorical support for the Commission with quiet efforts to limit its effectiveness continued this strategy with the Tribunal. The same financial constraints were evident, and states retained their power to give or withhold information critical to building cases against senior leadership.<sup>38</sup> Yet even before this, the year and a half that it took to appoint a Chief Prosecutor provides perhaps the clearest example of indirect constraint. The initial appointee, Ramon Escovar Salom of Venezuela, formally held office from October 1993 to February 1994 but evidently was never in a position to actually begin work—a factor that, far from being a surprise, appears to have been considered a positive qualification for the job.\* Richard Goldstone was not appointed until August 1994, and so long as there were no actual investigations or indictments, there was nothing to obstruct.

Moreover, in selecting Goldstone, the major powers chose a particular person with a particular approach. Goldstone was a politically astute individual, and very concerned with ensuring the existential survival of the ICTY as an institution. He recognized that the straightest path lay in having trials, and this necessarily meant going after the kinds of individuals who could be readily acquired. A different logic, of course, might have counseled pursuing those most responsible,<sup>†</sup> indicting them promptly, and waiting for events, but the first indictments were—the language of the Resolution 827 and the Prosecution’s stated intention of pursuing the most responsible notwithstanding—mostly aimed at low-level perpetrators.<sup>39</sup> There is no evidence of direct interference by the major powers in Goldstone’s prosecution strategy, but neither is there evidence of any effort to encourage him to pursue higher-level cases from the outset. For those interested in pursuing a negotiated peace as the highest priority, Goldstone’s approach posed no contradiction.

The major powers' continuing priority was a political settlement that would stop the fighting, and to achieve this, they were prepared to negotiate with the same individuals the Commission and Tribunal inevitably needed to investigate. These people—Milošević, Tuđman, Karadžić, Mladić—were being treated by major states and the UN as consequential leaders, and indeed their significance and influence was only increasing; Milošević was even received at the Élysée.<sup>40</sup> It was this prioritization of peace over justice that led to so many bureaucratic and financial hurdles being thrown in the Tribunal's way, preventing it from obtaining evidence of criminality. As a result, although the Commission's Interim Report had brought the atrocities to light and helped to develop political momentum for establishing the ICTY,<sup>41</sup> the Tribunal that resulted was, like the Commission, initially toothless.<sup>42</sup>

#### **D. Peace through accommodation: The strategy of moral equivalency**

Concerns with protecting peace negotiations had led to restrictions on the Commission at its founding; those concerns continued to affect the Commission's work, the reception of its findings, and the work of the ICTY. Lord Owen had adopted a negotiating strategy premised on treating all three sides equally and establishing "moral equivalency" among them. Owen feared that war crimes investigations would threaten this effort, because he was concerned—accurately, as it turned out—that investigations would show the Serbs had committed most of the crimes, followed by the Croats, with the Bosniaks being the principal victims.

In my work with the Commission, I had one particularly illustrative meeting with Lord Owen. After being told that the Commission had investigated one mass grave of 200 Croat victims killed by Serbs and one mass grave of 39 Serbs killed by Bosniaks, Lord Owen replied, "Professor, you have to investigate *three* mass graves of 200 each, do you understand?"<sup>43</sup> This was a classic instance of *Realpolitik*: "equivalency" really meant disregarding the possibility that there were victims and perpetrators, only actors with influence on the possible outcome.

Nor was this even true neutrality: Owen in effect adopted the Serbian propaganda narrative that the conflict was based on ancient hatreds and that the warring factions were equally responsible for the violence,

because it served his ends to seek peace without having to concern himself with justice for victims.<sup>44</sup> This was taking the UN goal of maintaining impartiality too far—attempting, not merely to eschew any one party’s preferred narrative, but to establish an alternative truth and act upon it.<sup>45</sup> The effect, of course, was to make even more concrete the role of those most capable of creating violence as partners in negotiating peace.

### **E. Essential partners: American entanglement with Milošević**

Although it had supported the Commission and the Tribunal, the United States was actually rather hesitant about aggressively pursuing investigations into crimes and human rights violations in the former Yugoslavia. President Clinton had campaigned on a “lift and strike” strategy of lifting the arms embargo on Bosnia and launching air strikes against the Bosnian Serbs, but in office his administration initially exhibited little appetite for robust military intervention, showing an inclination toward restraint—and equivalency—similar to that experienced by the British and French.

When, from 1994, the United States and its NATO allies increasingly weighed in on the side of Croats and Bosniaks, one might have expected—still following the logic of *Realpolitik*—calls for the newly established Tribunal to actively investigate the senior Serb leadership. Support by the United States for the Tribunal and other investigatory initiatives in 1994 and 1995 was fairly substantial: three million dollars for a computer system to handle the flow of evidence<sup>46</sup> and 22 lawyers and investigators seconded to work in the Prosecution.<sup>47</sup> But although the United States supported the Tribunal as an institution, its commitment to the Tribunal was, in significant part, tactical.

The reason, and the reasoning, is familiar: a logic derived from *Realpolitik* and incentives created by a push for a peace settlement, which combined to push concerns of justice off the negotiating table. In many respects, of course, the U.S. approach was very different from Owen’s: It was robust and militant. The U.S.-brokered Croat–Bosniak alliance and NATO bombardment had dramatically altered the military balance to the Serbs’ detriment—so much so that in effect the stalemate in Croatia was broken and the problem of the RSK effectively, if brutally, nullified. Within Bosnia too, the military balance had shifted, with Serb-held areas



in the west falling to Croat and Bosniak forces, but also Bosniak safe areas along the Drina falling to the Serbs, and Sarajevo vulnerable. These situations represented strategic obstacles to consolidated ethnic territories, and to a peace settlement; even if it was allied with one side, a U.S. administration focused on achieving a settlement had to bring all sides to the negotiating table.<sup>48</sup>

Thus, at Dayton, Richard Holbrooke—despite a very different approach to diplomacy and vastly stronger resources to bear—ended up following a surprisingly similar line to the equivocal Owen. Milošević became the essential guarantor of peace, displacing the RS leadership, which now became expendable to the United States. His cooperation was essential, and more valuable than whatever might have been gained from his prosecution. Karadžić and Mladić had been recently indicted, of course, and the United States declared them *personae non gratae* at the conference—but this represented less a commitment to justice than a function of the U.S. Milošević-centered strategy.\*

Indeed, Washington considered giving up the ICTY entirely at Dayton, as its perceived value—to goad Milošević to the negotiating table—had been achieved.<sup>49</sup> Now that negotiations were underway, little was to be gained by actually empowering the Tribunal to pursue the principals upon whom peace depended. The Dayton Accords affirmed an obligation to cooperate with the ICTY,<sup>50</sup> but contain no enforcement mechanisms. The United States refused to include clauses establishing a police force to enforce ICTY warrants or aid investigations, despite a plea from Judge Cassese.<sup>51</sup> Although NATO had primary authority for security in Bosnia, its forces were not given a clear mandate regarding arrest and transfer of indictees<sup>52</sup>—something that the United States could have secured if it had wanted to—and it quickly became clear that NATO was not making arrest of indictees a priority.<sup>53</sup>

There has long been speculation that, at Dayton, Holbrooke offered Milošević a pledge that the United States would discourage investigation of him by the ICTY.<sup>†</sup> There is no evidence that Holbrooke did this, and it is impossible to prove the negative. My guess—and it is only that—is that just such a message was conveyed, but in any event, an explicit guarantee would hardly have been necessary: The failure to include meaningful enforcement mechanisms would have signaled as much to Milošević.<sup>54</sup>



So, too, would the evident logic of the U.S. negotiating strategy: It would not behoove the United States to indict the man it was relying on first to maintain peace. As Holbrooke stated before the Dayton negotiations, “you can’t make peace without President Milošević.”<sup>55</sup> By the realist-cum-accommodationist logic under which Dayton was agreed, the very fact that U.S. officials knew Milošević was responsible for many of the crimes in Bosnia made him all the more valuable as an interlocutor—and that knowledge, in turn, was incompatible with an assertive policy of supporting justice.

### **III. The End of Usefulness: The Push to Prosecute**

Although the killings, rapes, ethnic cleansing, and other crimes in Bosnia and Croatia were well documented—even as they were ongoing—they did not lead to Milošević’s indictment.<sup>56</sup> That, as Williamson discusses, occurred only much later, and the reasons the indictment came when it did further illuminate our understanding of why it did not come earlier.

In responding so brutally to the challenge of the KLA from 1997 on, Milošević implicitly relied on the same congeries of factors that had governed events, and protected him, in the early 1990s: the divisions within Europe, the wariness of major Western powers to get militarily involved in the Balkans again—perhaps, too, those speculative assurances—and Russian protection at the Security Council. This proved a miscalculation, however: This time the United States acted forcefully and effectively, through NATO, to confront Milošević.<sup>57</sup> Russia’s veto power proved no brake on NATO, which simply acted without Security Council authorization.

The Western world had seen what happened to Bosnia and was not going to stand idly by as Milošević did the same thing in Kosovo.<sup>58</sup> In part, the shift in U.S. and British attitudes was a function of changing personnel: Albright, who became the U.S. secretary of state in 1997, adopted a more confrontational approach than her predecessor, Warren Christopher, and was also more passionate about pursuing ICL; in May 1997, the Labour Party came to power in the U.K., likewise infusing a new will to prosecute war crimes.<sup>59</sup> But viewed from a realist perspective, this

explanation simply begs the question of why these voices now proved persuasive, why the West—which had, after all, known about the atrocities in Bosnia and Croatia long before it acted—took a different path now.

The shift was a function of the Dayton logic running its course. Milošević had been essential to a peace deal, and, at the start, to its maintenance; but two years on, Croatia's security were assured, as was NATO's control of Bosnia. There was no longer any need for policy makers to ignore what they knew about his responsibility—knowledge that, earlier, had been the very basis for their belief in Milošević's essential role. Milošević simply was not needed anymore.

Once Milošević ceased to be useful, his ability to cause trouble now was simply that: a threat to be dealt with. When Milošević began to crack down on the KLA and the ethnic Albanian population of Kosovo through increasingly harsh police and military measures, the Clinton administration and leading states in NATO now perceived those actions as potential threats to the broader regional stability they had so recently secured. Their response, compared with their inaction during the Bosnian war, was rapid, reaching to the brink of military intervention by the fall of 1998, and to actual war in March 1999.<sup>60</sup>

Along with military action came a new readiness to see justice be done; with the shift in U.S. and British attitudes at the beginning of the Kosovo crisis, the Prosecution began to receive more support for the possibility of investigating Milošević. During the bombing campaign, prosecutors received extensive intelligence from the United States, including satellite imagery. Even more important than the material support, however, was the implicit greenlighting, the signal that the formerly divided states of the West were willing to see an investigation proceed and, by the time of the actual conflict, increasingly eager to assist it.<sup>61</sup>

The result was the period of forthright and purposeful activity, under Arbour's direction, leading to a speedy indictment that Williamson describes.\* The very speed and efficiency of that process, however, simply returns us to the question of why indictments for Milošević's other actions, in other wars, had not been pursued in the same way.

The puzzle with which we began thus has contours that we can understand as phases in which *Realpolitik* interacted with and influenced

the work of the Prosecution: first, a period in which the Bosnian Serb leadership and Milošević were considered necessary partners, during which the idea of indicting any of them was problematic; then, from 1995, withdrawal of this implicit protection from the Bosnian Serb leadership as the war wound down, leaving Milošević in an even more important—and untouchable—position; and finally the abandonment of a now-unnecessary Milošević with the rising crisis in Kosovo. This sequence describes not only the foreign policy perspectives of the United States and its NATO allies, which are clear enough, but also explains the puzzle of non-indictment, once one accepts the influence of those foreign policy interests on the decisional processes of the Prosecution.

## **IV. Conclusion: What Could Have Been Done?**

Admittedly, getting proof sufficient for an actual trial would have been daunting even with the full cooperation of the major Western powers, and as we have seen, they had been unwilling to cooperate with the Tribunal so long as they viewed Milošević as a necessary negotiating partner for peace.<sup>62</sup> Demonstrating Milošević's role as the principal architect of these crimes would have required access to documents and insider witnesses available only in Belgrade and, to a lesser degree, in the Serbian areas of Croatia and Bosnia. Indeed, as Williamson acknowledges, the actual indictment, when it came, still relied on a strategy of turning Milošević's former allies against him—a strategy that was never fully successful, but which would have been unthinkable during the early 1990s when Milošević's power was at its height. \*

But even with these limitations, there were theories of liability that could have been explored even during the Croatia and Bosnia wars, or the years between Dayton and Kosovo—command responsibility, complicity, aiding and abetting, and JCE—theories that were ultimately used in the *Bosnia* and *Croatia* indictments and in other cases, including some brought at the time.<sup>63</sup> These theories allow relaxed evidentiary standards compared to the locus classicus of perpetration.<sup>64</sup> Command or superior responsibility, for example, can impose liability on a commander for actions his subordinates undertook, even if he did not order the actions or



even know of them at the time.<sup>65</sup> Complicity, aiding and abetting, and JCE likewise can allow lowered mens rea—as in the (admittedly controversial) view that JCE type III allows the genocidal intent of some members of the JCE to be imputed to others. So, once indictments were issued against Karadžić and Mladić for genocide at Srebrenica, for example—which happened in 1995<sup>66</sup>—all that would have been required to charge Milošević with, say, complicity in genocide would have been a claim that he was in a position of de facto authority over Karadžić and Mladić or in a JCE with them. Just such a claim was in fact what the Prosecution alleged, five years later.\*

As for the difficulty of acquiring insider witnesses, given that, even when the *Kosovo* indictment was issued—a time when Milošević was still firmly in power<sup>67</sup>—the Prosecution was counting on insider witnesses to come forward, it is difficult to see why an earlier Chief Prosecutor could not have similarly gambled on the transformative power of an indictment to force events.

But the Prosecution did none of these things. Even the materials the Prosecution did have—such as the work compiled by the Commission of Experts—went largely unused. The reasons, as we have seen, have less to do with evidentiary standards, and more—nearly everything—to do with commitment: that is to say, with politics. Although politics play an integral part in bringing international criminals to justice—for without political will, functioning tribunals would never be established—the logic of *Realpolitik* has operated consistently to undercut the purpose of ICL, which is to bring about both justice and peace. Milošević's indictment for Bosnia and Croatia was delayed because of misplaced reliance on *Realpolitik* as the only path to a peaceful resolution of the Yugoslav crisis. When peace was sought at all costs, as in Lord Owen's negotiations and at Dayton, it became necessary to transform Milošević from war criminal into peacemaker—not because the other peacemakers were ignorant about what Milošević had done and was capable of, but precisely because they knew.<sup>68</sup>

The essential conceptual move required to undertake such a plan—required, even, to perceive of such a plan as worthwhile, rather than as profoundly misguided—is the assignment of moral equivalency to the parties. Moral equivalency made questions of justice extraneous to, even



distracting from, the quest for peace based on a balance of power and nothing more.

The question, then, is if peace can be achieved any other way. To this the answer should be obvious: Of course it can. The choice of peace or justice must be recognized as a false dichotomy that undercuts the attainment of either. The mentality that perceives a necessary choice between the two disregards the lived reality of the populations among whom peace must be made and for whom justice often matters. The logic of *Realpolitik* purchases, at best, temporary, tracial solutions, but not lasting peace.

Such an attitude fails to recognize the practical, political effect that justice projects can have, and not only in the long term. Milošević miscalculated NATO's resolve in 1999, but he did so at least in part because he had accurately understood the logic by which those same powers had operated in the earlier wars. Had Milošević thought that he would be called to account for the atrocities committed in Bosnia and Croatia in the early 1990s—had he not been transformed into a peacemaker, but rather faced condemnation and a meaningful threat of prosecution—he and his subordinates might well have been deterred from carrying out their plans in Kosovo.

In theory, the Prosecution could have pursued an investigation against Milošević without the support of the major powers, but this would have been asking a great deal from a weak, fledgling institution.<sup>69</sup> Instead, it acquiesced in the political logic that had marked the Tribunal's creation and its progress, and although this is blameworthy, true responsibility rests with those who championed that logic. The Commission of Experts' contribution was underutilized, and available theories of liability were not pursued at the ICTY for the same reason: The powers that could have supported the Tribunal were instead pursuing a policy dependent upon a theory of moral equivalency, upon which their hopes for a purely political peace depended, but because of which justice seemed a dangerous luxury. But no peace can last, and no court prosper, under such a theory; ultimately, it must be the aim of the international community not to choose, tragically, between peace and justice, but to pursue both.

# 7

## Slow Poison

### Joinder and the Death of Milošević

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*This chapter reviews the practice of joinder and severance at the ICTY, focusing on the poor reasoning of the Appeals Chamber in joining the Milošević indictments, the failure of the Trial Chamber to trigger a severance clause in the Appeals ruling, and the way this led indirectly to Milošević's death before final judgment. The Appeals decision set up an overinclusive practice of joining accused and indictment, which has implications far beyond Milošević's terminated trial: Together with reliance on charges based on joint criminal enterprise and the pressure of the completion strategy, it creates a lack of separation between trial structures and a greater focus on administering trials than on ensuring just processes and outcomes.*

The *Milošević* case is often thought of as a single trial. In fact, it was three conjoined trials that emerged out of separate indictments relating to crimes committed in Croatia, Bosnia, and Kosovo. Although the three indictments had been drafted, reviewed, and confirmed at separate times, the Appeals Chamber ruled, on the very eve of the trial, that they should

be treated as a single indictment and tried together.<sup>1</sup> This decision, and the chain of events that followed from it, led to a criminal trial of unsurpassed duration and complexity, and ultimately to Judge Robinson closing the proceedings on 14 March 2006 after Milošević's death in custody a few days earlier.

The decision to join the *Milošević* indictments was not made in a vacuum, and this chapter considers it in the broader context of the ICTY's practice on joinder and severance. It then focuses on the surprising decision of the Appeals Chamber to join the three *Milošević* indictments for Croatia, Bosnia, and Kosovo, and the failure of the Trial Chamber to trigger a severance clause available to it in the Appeals Chamber ruling. This chapter also considers how the Appeals Chamber ruling in *Milošević* established an overinclusive practice of joining accused and indictments, which, along with reliance on charges derived from the theory of JCE and the pressure of the completion strategy, has created a lack of separation in trial structures and a greater focus on administering trials than on ensuring just processes and outcomes.

But first, before turning to the decision to join these indictments and the ramifications, it is important to understand how the *Milošević* case was constructed and the way the practice of joinder operates at the ICTY.

## **I. The *Milošević* Indictments**

### **A. The *Kosovo* indictment**

Before there was ever any real hope that Milošević would be arrested and transferred to the Tribunal, Prosecutor Louise Arbour presented an indictment against Milošević and four others for crimes committed in Kosovo.\* As with almost all indictments presented for review,<sup>†</sup> it was confirmed.<sup>2</sup>

The indictment alleged that, together with named and unnamed others, Milošević “planned, instigated, ordered, committed” or “otherwise aided and abetted in the planning, preparation or execution” of crimes against humanity, war crimes and violations of the laws or customs of war.<sup>3</sup> “Committing” referred to participation in a JCE with other Serb elites, the purpose of which was to expel a substantial proportion of the ethnic

Albanian population from Kosovo,<sup>4</sup> in order to create an ethnically pure region as part of the Accused's plan to create a Greater Serbia. To achieve this, Milošević—by way of either a JCE or his direct command of Serb political and military structures—was said to have committed persecutions, murder, detention, deportation or forcible transfer, rape, inhumane treatment, wanton destruction, and plunder of public and private property.<sup>5</sup> The indictment further alleged that because he had held a position of superior authority, Milošević was also responsible for the criminal acts of his subordinates.<sup>6</sup>

## **B. The *Croatia* and *Bosnia* indictments**

The investigation for Kosovo took place “in real time,” as Arbour noted when the indictment was announced.<sup>7</sup> However, the Prosecution had been investigating Milošević's responsibility for Bosnia and Croatia for some years.<sup>\*</sup> Shortly after Milošević's arrest and transfer to the ICTY, the *Croatia* indictment against Milošević was confirmed;<sup>†</sup> the *Bosnia* indictment quickly followed.<sup>‡</sup>

In those two indictments, the Prosecution alleged that from 1991 to 1995, Milošević—together with Croatian and Bosnian Serb leaders, high-ranking members of the JNA (and later VJ) and the Serbian MUP, and other leading Serb and Montenegrin figures—had been a key participant in the formulation, preparation, and execution of a plan to impose and maintain Serb control over targeted regions of the former Yugoslavia by forcibly removing Muslim, Croat, and other non-Serb inhabitants through persecutory campaigns.<sup>8</sup>

In Croatia, crimes were committed in six different regions claimed by the Serbs. In all of them, it was alleged that the Serbs sought to create an ethnically pure region. To achieve this, Milošević—again, either by way of a JCE with or through command of the Croatian Serb political structure, together with their military and paramilitary formations—was said to have committed extermination, murder, torture and other forms of cruel treatment, unlawful detention, forcible transfer and deportation, wanton destruction, and plunder, with some acts also charged as persecution.<sup>9</sup>

The *Bosnia* indictment charged Milošević with crimes committed in 47 municipalities—a little under half of the prewar total. The Prosecution



selected 14 municipalities in which it would adduce comprehensive evidence of crimes and Milošević's participation.<sup>10</sup> As with Croatia and Kosovo, for all the enumerated crime locations, it was again alleged that an ethnically pure region was sought, and again Milošević was said to have either taken part in a JCE or directly controlled military and paramilitary formations to commit a range of crimes, including, in Bosnia, genocide.<sup>11</sup>

## II. The Case for a Greater Serbia

In each indictment, the Prosecution alleged that the purpose of the crimes and the JCE was to create an ethnically pure Serb region. This would turn out to be a critical commonality, because the argument for joinder would revolve around the Prosecution's characterization of Milošević's espousal of and aspirations for a Greater Serbia. Before turning to doctrinal requirements of joinder, we should consider what the Prosecution asserted about the factual relationship and unity of these three sets of allegations.\*

The way the Prosecution characterized Milošević's relationship to the creation of an ethnically pure Serb political territory shifted considerably during the trial. The language of the initial indictments themselves were not consistent: The *Croatia* and *Bosnia* indictments asserted a JCE with the creation of a "Greater Serbia" at its heart,<sup>12</sup> whereas the *Kosovo* indictment did not mention Greater Serbia, instead referring to expulsion of a substantial portion of the Albanian population from Kosovo in an effort to ensure continued Serbian control over the province.<sup>13</sup> In its opening statement, the Prosecution alleged that the search for power motivated Milošević, and thus that his acts were not motivated by ideology or nationalist sentiment.<sup>14</sup> Two years later, in its response to the *Amici Curiae* motion for judgment of acquittal,<sup>15</sup> the Prosecution referred to the "planned Serbian state" several times<sup>16</sup> and an "extended Serbia" relating to the territories in Bosnia, which it argued Milošević wished to see incorporated into Serbia.<sup>†</sup> Finally, the Prosecution's case theory regarding Greater Serbia in relation to the Accused manifested itself in a different, much narrower approach in cross-examining defense

witnesses.<sup>17</sup> The Prosecution position appeared inconsistent: On the one hand, it argued that Milošević wanted to create a Greater Serbia and, on the other, that he never in fact advocated such a concept.

Milošević's defense also offered counter-narratives that exposed weaknesses in the Prosecution account. Vojislav Šešelj appeared as a defense witness and claimed that the creation of a Greater Serbia was never Milošević's policy but rather his and his party's, the *Srpska radikalna stranka* or SRS (Serbian Radical Party).<sup>18</sup> Šešelj testified that the historical meaning of the concept was the creation of an area consisting of all people speaking the Shtokavian dialect and encompassing all of Bosnia and the majority of Croatia, except for Zagreb, Križevci, and Varaždin.<sup>19</sup> Quite apart from his proprietary claim, Šešelj's definition of Greater Serbia—going, as it did, so much farther than the apparent military aims actually pursued by the forces allegedly under Milošević's control—raised questions about the Prosecution's characterization of the territorial aspirations and motives of Milošević.

When, late in the trial, the Chamber pressed for a clarification of its case on Milošević's relationship to Greater Serbia, the Prosecution explained:

[T]he ambitions of this accused at the material time and once the possibility for retaining the former Federal Republic of Yugoslavia were gone, his ambitions were to have an enlarged, or he was party to the ambitions to have an enlarged, Serbian state and that informed his actions.

...[O]nce the decision had been made to let Slovenia go, Croatia was allowed to go or it was contemplated that Croatia could go on terms that it left but without the parts that were going to remain under Serbian control, and at that stage, again to pick up on His Honour Judge Bonomy's point it wasn't the plan at that stage to include all of Bosnia except that. They faced the realities and restricted themselves to the parts as the accused himself says in various places dealing with it by percentages that it was realistic for them to retain.<sup>20</sup>

Thus, for all the shifts, the Prosecution's explanation showed that it effectively drew a distinction between the actions and intentions of Milošević with regard to the espousal of a Serb-controlled state from which non-Serbs were to be removed, and those of nationalists such as Šešelj, who advocated a Greater Serbia based on an ideological and historical idea that encompassed broad swathes of territory of the former Yugoslavia. The Prosecution's actual theory of Milošević's motivation, as

developed through the trial, was that Milošević acted out of political opportunism and a quest for personal power rather than an ideological commitment to a Greater Serbia.

But this was not the theory on which the Prosecution had successfully sought joinder of the three indictments. Ironically, it was the more extreme articulation of the importance of Greater Serbia to Milošević that the Prosecution had relied upon in its argument before the Appeals Chamber. They say that bad facts make bad law, and the Appeals Chamber ruling in this case would set a regrettable precedent with regard to joinder at the Tribunal.

### **III. Joinder of Indictments at the ICTY**

The Prosecution had indicted Milošević for three sets of crimes, committed in three different countries and, for Kosovo, at a different time. What connected these indictments was a person—Milošević—and a theory—Greater Serbia. The question, then, was whether these were sufficient to combine the indictments into a single trial.

The ICTY may try several different people together, or may try one person on several different charges. Several people may be tried together if they are “accused of the same or different crimes committed in the course of the same transaction[,]”<sup>21</sup> whereas “[t]wo or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.”<sup>22</sup> Together, these rules allow the joinder of originally separate indictments or trials.

#### **A. Joinder of charges and accused**

The Prosecutor has made considerable use of the provisions for joining charges. For example, the indictment against Milorad Krnojelac, the Bosnian Serb commander of the Kazneno-Popravni Dom detention camp in Foča, charged him with seven crimes, all arising from his alleged acts or omissions in his role at the camp.<sup>23</sup> The vast majority of the crimes tried before the ICTY are committed in the context of widespread attacks,



invariably in the context of an armed conflict and involving a significant number of co-perpetrators at varying levels of authority—formal and informal—and participating in the commission of crimes in different ways. Many indictments before the ICTY therefore charge one or more accused with responsibility for crimes committed by multiple perpetrators.<sup>24</sup> Both forms of joinder mention the need for “the same transaction,” defined as “[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.”<sup>25</sup>

The practice of cumulative or alternative charging has been frequently challenged by accused before the ICTY. However, overwhelmingly it has been upheld as an appropriate practice because of the complex structure of the crimes at issue, and the continual development of the law on the elements of crimes.<sup>26</sup> The provision for joinder of accused and charges appropriately reflects the collective nature of international crimes and the resource constraints under which the Tribunal operates. However, as will be seen from the practice of joinder following the Appeals Chamber ruling in *Milošević*, it also reflects considerable political pressure, in the form of the Completion Strategy.\*

## **B. Joinder of indictments or trials**

The Prosecution often requests joint trials of multiple accused charged under different indictments, or the merger of several existing indictments against a single accused into a single joint indictment that will underpin a single trial, as happened with Milošević. This is partly due to the Prosecution’s practice of basing charges on a JCE theory, which implies multiple participants and whose requirement that the crimes be part of a common scheme, strategy, or plan is very similar to the definition of a criminal “transaction” required for joinder.<sup>27†</sup> Other factors that have influenced this charging practice include the significant increase in the number of accused brought to the ICTY in the last few years, and the Completion Strategy that put considerable pressure on the ICTY to merge their remaining trials and conduct them as expeditiously as possible. This has led to the Prosecution submitting proposed amended joinder indictments that reflect a supposedly “streamlined” account of the factual and legal bases of the charges against the accused, but which also



incorporate additional amendments, some of which have substantive modified the charges.<sup>28</sup>

A chamber reviewing a motion to join indictments applies a two-step test based on the Rules, as well as considerations of efficiency, and fairness. The first prong of the test is satisfied by a *prima facie* showing that the crimes were committed in the course of the same criminal transaction.<sup>29</sup> The second requires a case-specific consideration of several factors, including (1) if joinder would avoid duplication in presenting evidence about the crimes and forms of responsibility alleged against the multiple accused, minimize hardship to witnesses, or otherwise promote judicial economy; (2) if joinder would create a conflict of interest or otherwise prejudice the right of any of the accused to a fair and expeditious trial; and (3) if there is any other factor that persuades the trial chamber it will not be able to manage the proposed joint trial.<sup>30</sup> A chamber may exercise its discretion to deny joinder.<sup>31</sup>

Unlike joinder of charges, the joinder of indictments or trials is less a consequence of the nature of international crimes, and more a result of a combination of limited resources, prosecutorial strategy, and the external pressure brought to bear by the Completion Strategy. It is therefore hardly surprising that, at the ICTY, the practice has increased in frequency. The escalation in joinder has created tensions in the jurisprudence as the pressure of the Completion Strategy on judges becomes more obvious and increases the risk that their independence might be compromised.

An example of this arose in an application for joinder in what would become the largest multi-accused trial since Nuremberg and Tokyo—*Popović et al.* In this case, one of the accused asserted that “the Completion Strategy should not influence the Trial Chamber in its determination of the joinder motion or be allowed to influence the right of an accused to a speedy trial.”<sup>32</sup> Judge Robinson, in an opinion separate to the unanimous decision granting joinder, stated that “the Security Council resolution does not impose an obligation on the Tribunal to do anything other than adopt all reasonable measures to meet the deadlines set” and should not “be interpreted as requiring the Chambers to exercise their judicial function in a manner that enables the Tribunal to meet the deadline, but breaches the fundamental principle of fairness in the trial process.”<sup>33</sup> Robinson concluded:

While it would be quite proper for the Prosecutor to be influenced by the Completion Strategy in determining her prosecutorial strategy, including the joinder of accused, the Completion Strategy would, as the Appeals Chamber has held, be an “improper consideration” in the decision of a Trial Chamber. This is true even though the implementation of the Strategy may have implications for factors (such as judicial economy) of which a Trial Chamber may properly and quite independently take account.<sup>34</sup>

Judge Robinson’s response may, on its face, appear defensive. However, the context in which it was made explains its tone and forcefulness. The Completion Strategy has placed a significant restraint on the Tribunal’s work and longevity; political and financial support for the ICTY’s work has ostensibly been capped, and the pressure on the Tribunal to conclude its remaining trials in a matter of a few years—while maintaining judicial independence and focusing only on the forensic, not the political, aspects of the trials before it—is perhaps an impossibly onerous task.<sup>35</sup>

Indeed, a review of some opinions of Judge Hunt, a respected Appeals Chamber judge, shows just how difficult this task may be. On a number of occasions, Hunt dissented and openly criticized his colleagues on the appellate bench for what he considered a “destruction of the rights of the accused enshrined in the Tribunal’s Statute and in customary international law,” caused by reversing or ignoring previously carefully considered interpretations of the law or procedural rules on the basis of an improper contemplation of the Completion Strategy.<sup>36</sup> In this context, Judge Robinson’s unease is understandable.

### **C. Severance**

In addition to joining accused and indictments, chambers can also order separate trials of jointly accused persons if necessary to avoid prejudice to the rights of any of the accused or to protect the interests of justice.<sup>37</sup> As with joinder, trial chambers have broad discretion to order severance,<sup>38</sup> and have done so in cases where delays caused by the ill health of one accused would prejudice the rights of his co-accused to trial without undue delay.<sup>39</sup> But this has been the rarer outcome: As one ICTY Trial Chamber noted, “[t]he majority of motions for severance ... have been denied on the basis that continuing with joined proceedings would best protect the interests of justice.”<sup>40</sup> Still, the right to sever would prove a crucial,

though ultimately unused, measure available to the Trial Chamber in the *Milošević* case, to which we now turn.

## **IV. “The Same Transaction:” Joinder of the *Milošević* Indictments**

### **A. The Prosecution’s application and the Trial Chamber’s decision**

Shortly after confirmation of the final Bosnian indictment against Milošević, the Prosecution filed a motion to join the three indictments.<sup>41</sup> The Prosecution argued that the three indictments concerned “the same transaction in the sense of a common scheme, strategy or plan, namely the accused Milošević’s overall conduct in attempting to create a ‘Greater Serbia’—a centralised Serbian state encompassing the Serb populated areas of Croatia and Bosnia and Herzegovina, and all of Kosovo.”<sup>42</sup> In support of this view, it pointed to paragraph 6 of the *Croatia* and *Bosnia* indictments and paragraph 16 of the *Kosovo* indictment, each of which essentially alleged the forcible removal of non-Serbs from the respective territories through the commission of crimes sanctioned under the ICTY Statute. As already discussed, this turned out to be something of a misrepresentation of the case the Prosecution later presented.

The Prosecution also argued that joinder would lead to a fairer and more expeditious trial: A single trial would be shorter; the Accused would not have to face trial at the same time he was confronting two pretrial phases; there would no need to consider how to incorporate evidence or findings from one trial into another; the number of witnesses would be lower (since those testifying on history or policy could be called just once); aggravating and mitigating factors—probably common to all three indictments—could be determined together; the provision of exculpatory evidence would also be better facilitated with one trial; and a single trial would promote judicial economy.<sup>43</sup>

It was also argued that the trauma to victims would be lessened if they only needed to testify once, while security concerns would likewise be lessened if witnesses only had to travel to The Hague once.<sup>44</sup> Finally, the



Prosecution argued that a single trial would ensure that judgments did not conflict, because the same Chamber would decide issues of credibility and evaluate all the evidence. A single trial would also obviate concern about having to appeal one trial while the second or third trial was still ongoing.<sup>45</sup>

Although these are all conceptually valid arguments, the reality of international criminal proceedings renders many of these arguments invalid—or at least of less significance. First, the practice of the ICTY has been (and continues to a very considerable extent) to introduce most evidence—and certainly crime-base evidence—in written form, reducing the requirement of the presence of witnesses, often even for the purposes of cross-examination.\* Second, where witnesses are required to testify in person, they often must do so in a number of different and related cases anyway. Likewise, the argument about different Chambers evaluating issues of credibility is no different across cases with similar fact patterns and related accused. Finally, these arguments must of course be weighed against important countervailing arguments of fairness and expedition of proceedings.

In its ruling, the Trial Chamber allowed joinder of the *Croatia* and *Bosnia* indictments, but denied joinder for *Kosovo*.<sup>46</sup> The principal issue in dispute was whether the events to which all three indictments related formed part of the “same transaction,” that is, part of a common scheme, strategy, or plan. The Trial Chamber reasoned that the reference to a “series” and the use of the phrase “committed together” in Rule 49 indicated that the relevant acts must be connected and that there is no power to join otherwise unconnected acts merely because they form part of the same plan; that is, the counts must represent interrelated parts of a particular criminal episode. The Chamber also stated that in case of dissimilarity in time and place, the conclusion that the counts represent interrelated parts of a particular criminal episode would be more difficult to draw.<sup>47</sup>

Because of the geographic and temporal differences between the *Kosovo* indictment on the one hand, and the *Croatia* and *Bosnia* indictments on the other, as well as the distinction in the way the Accused was alleged to have acted in each, the Trial Chamber held that *Kosovo* could not be said to form part of the same series of acts committed



together in the sense of “the same transaction.” This conclusion was based on several considerations. First, there was a gap of more than three years between the last events in Bosnia and the first events in Kosovo.<sup>48</sup> Second, whereas the conflicts in Croatia and Bosnia took place in neighboring states, the conflict in Kosovo took place in the FRY itself.<sup>49</sup> Third, the Accused was alleged to have acted “indirectly” in relation to Croatia and Bosnia, but “directly” (as the Supreme Commander of the VJ) in relation to Kosovo.<sup>50</sup> Finally, and most significantly, there was no reference to a “Greater Serbia” plan in the *Kosovo* indictment.<sup>51</sup> The Trial Chamber concluded that the nexus would be too nebulous to point to the existence of a “common scheme, strategy or plan” required for the “same transaction” under Rule 49.<sup>52</sup>

The Chamber also cited several reasons arising out of concern for fairness to the Accused or considerations of process. The Chamber held that Rule 49 must be interpreted in such a way that joinder would not be permitted if it would prejudice Milošević’s right to a fair hearing, or if the interests of justice would be prejudiced, with factors such as judicial economy, especially the avoidance of duplication of evidence and hardship to witnesses, being taken into account.<sup>53</sup> The Chamber reasoned that the expectation that only 20 witnesses would have to repeat their evidence in separate trials would not be of great significance given the overall numbers of witnesses proposed,<sup>54</sup> and that it would not be unduly influenced by prejudicial evidence in one trial affecting another—in case such a risk arose, the evidence would simply have to be excluded.<sup>55</sup>

Finally, the Trial Chamber made two points, which in hindsight were of great significance: (1) holding a single trial of the expected length would be far too long, whereas the Trial Chamber could manage two separate trials more easily;<sup>56</sup> and (2) making the Accused defend himself against the three indictments together would be onerous and prejudicial, particularly given the different circumstances of the *Kosovo* indictment.<sup>57</sup>

## **B. The joinder application on appeal**

The Prosecution quickly appealed the Trial Chamber’s ruling,<sup>\*</sup> and won: the Appeals Chamber ordered that the three indictments be tried together.<sup>58</sup> It is now clear that this ruling set in train a trial that was

unmanageable, and can be said to have made a significant contribution to Milošević's death and the premature termination of the trial.

In the Appeals Chamber's opinion, the Trial Chamber misinterpreted Rule 49, and the correct interpretation led to the conclusion that the acts alleged in the *Croatia, Bosnia, and Kosovo* indictments formed the same transaction.<sup>59</sup> First, the Appeals Chamber reasoned that Rules 48 and 49, dealing with joinder of accused and crimes respectively, must be considered in conjunction with each other, as each refers to events forming "the same transaction."<sup>60</sup> Therefore, the Appeals Chamber held, although Rule 49 speaks of acts being "committed together," this did not mean the events in Kosovo had to be contemporaneous with those in Croatia and Bosnia. It gave several reasons for this: First, an interpretation requiring the Prosecution to establish that all the offenses to be joined were committed together "creates an unnecessary dichotomy between the test for the joinder of offences (which would require the indictment to show that they were committed together for the purposes of Rule 49) and the test for the joinder of accused (where Rule 48 has no such requirement) [.]"<sup>61</sup> Furthermore, the definition of the term "transaction" in Rule 2 impliedly contemplates a much less restrictive temporal framework by permitting the common scheme, strategy, or plan to include "events at the same or different locations."<sup>62</sup> Geographic diversity is expressly allowed, and the Appeals Chamber concluded that there "is no logical explanation immediately apparent for a distinction to be drawn between allowing different locations but not allowing different events at different times."<sup>63</sup>

The Appeals Chamber also focused on the fact that Rule 49's "committed together" requirement does not exist in the French version; where the English has "if the series of acts committed together form the same transaction," the French reads "*si les actes incriminés ont été commis à l'occasion de la même opération.*"<sup>64</sup> In the event, the Chamber found that this apparent discrepancy was not intractable,<sup>65</sup> interpreting the English version of Rule 49 as follows: "if the series of acts committed (by the accused) together (in the sense of "considered together as a whole") form the same transaction[.]"<sup>66</sup> Relying on this reinterpretation, the Appeals Chamber held that the acts alleged in all three indictments formed part of the same transaction. Finally, the Appeals Chamber held that each

of the other reasons the Trial Chamber had articulated in rejecting joinder of *Kosovo* were relevant considerations, but none was decisive.<sup>67</sup>

Even without the benefit of hindsight, the ruling is highly questionable. The Appeals Chamber's approach to the definition of "same transaction" stretched the boundaries of logic. The Chamber held that the delay of three years between the last events in Bosnia and the first events in Kosovo was consistent with the definition of a "common scheme, strategy or plan" because the transaction did not have to maintain exactly the same parameters at all times but may include the achievement of a long-term aim.

Even if one accepted the Appeals Chamber's looser temporal reading, the decision's logic only established that *some* disparate events *could* constitute "the same transaction," not that *these* disparate events actually *should*.<sup>\*</sup> The most crucial aspect of the decision to join these three indictments into one trial was the Appeals Chamber's acceptance that the transaction tying these indictments together was a loosely described and defined Greater Serbia espoused by the Accused. The Appeals Chamber simply adopted and implemented the submissions of the Prosecution, without explanation of why it chose such an approach over that of the Trial Chamber.

The long-term aim alleged by the Prosecution was to establish or maintain Serbian control over particular areas that were or were once part of the former Yugoslavia.<sup>68</sup> In accepting this, the Appeals Chamber reasoned that, even though the indictments could have done more to clarify the nature of the Prosecution case, they made it sufficiently clear that the common purpose behind all the alleged crimes was the forcible removal of the majority of the non-Serb civilian population from areas that the Serb authorities wished to establish or maintain as Serbian-controlled areas.<sup>69</sup>

However, this reading required a very high level of generalization. Thus the common purpose had to include both the establishment and maintenance of Serbian control, because at the time of the events in Kosovo, Milošević was head of the state in which the crimes were committed; it could not therefore be said that he was seeking territorial expansion, as was alleged for Croatia and Bosnia, but rather, the expulsion or displacement of a portion of his own population. Similarly, the theory



had to be general enough to include diverse locations, jurisdictions, and modes of exercising authority: The fact that some events occurred within a province of Serbia and others within neighboring states was irrelevant, as were the radically different command and control structures;<sup>70</sup> the fact that Milošević was alleged to have acted directly within Kosovo but indirectly in neighboring states merely reflected different available means to achieve the same result.<sup>71</sup> All the ways in which these three wars and their crimes were different—time frame, domestic or international status, even the lack of overlap between members of the JCE alleged to have been involved in the different conflict<sup>†</sup>—had to be read out, leaving only the Prosecution’s assertion that an idea motivated them all.

It was the idea of a Greater Serbia that formed the forensic basis for the Appeals Chamber’s decision. As we have already seen, the Prosecution’s case on this crucial issue was ultimately explained quite differently when pressed during the trial, raising further doubt as to the appropriateness of the Appeals Chamber ruling.

## **V. Failure of the Trial Chamber to Sever**

The Appeals Chamber was not solely to blame for the path down which joinder would lead the trial. The Chamber’s ruling contained a significant paragraph that might be interpreted as something of an escape clause, but which the Trial Chamber failed to deploy. The ruling indicates a concern—despite the Appeals Chamber’s willingness to stretch the boundaries of legal logic to join the three indictments—that such a trial might become unmanageable:

Finally, if with the benefit of hindsight it becomes apparent to the Trial Chamber that the trial has developed in such a way as to become unmanageable—especially if, for example, the prosecution is either incapable or unwilling to exercise the responsibility which it bears to exercise restraint in relation to the evidence it produces—it will still be open to the Trial Chamber at that stage to order a severance of the charges arising out of one or more of the three areas of the former Yugoslavia. Nothing in the present Decision or in these reasons will prevent it from doing so.<sup>72</sup>

This left open the possibility for the Trial Chamber to later sever one or more of the indictments. In fact, the Trial Chamber twice considered



severance based on this passage of the Appeals Chamber ruling. The first time was in the context of Milošević's persistent ill health and as part of the Chamber's overall consideration of the future conduct of the case. In July 2004, the Chamber invited written submissions to consider ways to conclude the trial in a fair and expeditious manner, including the possibility of severing one or more of the indictments.<sup>73</sup> After taking submissions from the Prosecution and *Amici Curiae*,<sup>74</sup> the Chamber decided not to sever. It gave no reasoning at the time, simply stating that, although severance remained an option, it would "not give further consideration to it at this time."<sup>75</sup> By this stage, with the Prosecution phase already completed, the Chamber was focusing on imposing defense counsel upon the Accused as a way to gain control of the trial, which may explain why it was so quick to dismiss severance as a genuine option.<sup>76</sup>

In November 2005, the Trial Chamber again raised the possibility of severance, ordering the parties to make submissions on severing the *Kosovo* indictment and concluding that part of the trial.<sup>77</sup> Oral argument was heard and submissions made,<sup>78</sup> but the Chamber once again chose not to sever the indictments,<sup>79</sup> this time focusing on the time limits imposed for concluding the trial.

The Trial Chamber's reluctance is understandable. In one sense, the Appeals Chamber had dealt it an impossible hand, at once joining the indictments and at the same time saying that if the Trial Chamber had the courage, it could sever during the trial. Yet given Milošević's medical history and the torturous course of the trial, there was an argument for severance. In hindsight at least, severance of the *Kosovo* indictment would better have been made in September 2002, at the conclusion of the Prosecution case on Kosovo and when it became clear that Milošević was suffering from a grave medical condition that was likely to cause significant disruption to such an enormous trial.

Perhaps a stronger court would have seized this opportunity, but the *Milošević* Trial Chamber lacked the foresight or courage to sever. Instead, already hamstrung by the Appeals Chamber's intrusive and overreaching ruling, it faced strong opposition to severance from the parties, especially a Prosecution unprepared to take responsibility for the scope of the trial it had created through its decision to overcharge and its insistence on pushing ahead with a trial of clearly unsustainable scope. Indeed, the Trial

Chamber may well have considered the likelihood that, even if it were to sever, the Prosecution would simply take the matter on appeal, where the same Appeals Chamber would have been unlikely to acknowledge the error of its earlier ruling. Given the Appeals Chamber's response to its imposition of defense counsel, the Trial Chamber had every reason to suspect that an order of severance would simply be reversed on appeal.

## **VI. Conclusion: The *Milošević* Appeals Chamber Ruling as Precedent**

Perhaps the best proof that the Appeals Chamber's extremely broad approach to joinder logically overreaches is that it has made it theoretically possible to try together most, if not all, Serbs accused across the entirety of Croatia, Bosnia, and Kosovo for all events, so long as any aspect of the case against them involves participation in a plan to ethnically cleanse a region of non-Serbs—encompassing all indictments against Serbs before the ICTY, and making them eligible for joinder into a single super-trial. Indeed, this is exactly the direction the ICTY subsequently followed, with the *Milošević* joinder ruling paving the way for massive trials of multiple accused. The consequence of this has undoubtedly been some efficiency gain (although the *Popović* et al. trial of seven co-accused took four years from commencement to judgment); however, it has also meant enormous trials with considerable case management complexities, all of which carries a risk of compromising the fundamental *jus cogens* norm of a right to a fair trial.<sup>80</sup>

The Prosecution's use of JCE liability as a “silver bullet” in its indictments,<sup>81</sup> coupled with the Chamber's broad interpretation of the “same transaction” requirement, has made the joinder of accused and charges almost irresistible. Indeed, in a much later decision on another application to join three cases that were geographically and temporally very different, a special Trial Chamber composed of the presiding judges of all three Trial Chambers stated:

The very wide interpretation of the notion of “same transaction” adopted by the Appeals Chamber in the *Milošević* case leads the Trial Chamber to the conclusion that the requirement of “same transaction” has been met in this case as well. Indeed, the

Appeals Chamber decision makes it very difficult for any Trial Chamber seized of a joinder request alleging that the accused had a “common purpose” to conclude that such a requirement has not been met, even if the common purpose is a very broad and long-term one.<sup>82</sup>

The Appeals Chamber decision on joinder was one of the most significant decisions rendered in the *Milošević* trial. Its legal and practical consequences were profound, and the untimely and unsatisfactory conclusion of the trial four years later can be tied directly back to this ruling. In the framework of international criminal trials, this ruling and its consequence stand as a warning against overextending “same transaction” theories and underestimating the importance of practical case management issues in the exercise of a court’s discretion to join events or indictments into large complex cases.

*Milošević* was the flagship war crimes trial. The first trial of a former head of state conducted by an international tribunal was always going to present complexities and challenges. What is most disappointing about the conduct of the trial is the failure of some of the key players to act with poise, self-control, and a dedication to its efficient and successful functioning. The Trial Chamber’s ruling on joinder should have been respected and endorsed by the Appeals Chamber, particularly when it was so apparent how elastic its legal logic would have to be to overturn the Trial Chamber. Even putting aside legal interpretation of the relevant provisions, history shows that the Trial Chamber’s judgement was correct. Why the Prosecution would push so hard for such an obviously unmanageably large trial, and why the Appeals Chamber would support this push, are questions that will remain unanswered. The Trial Chamber’s unwillingness to attempt severance—however understandable—added to the predictable outcome.

The Appeals Chamber ruling in the *Milošević* trial set a precedent for sweeping joinder of accused and indictments at the ICTY. Some of this joinder practice has been appropriate, but others have been excessive. Coupled with the evolution of JCE as the key charging tool of the Prosecution in cases against senior-level accused, and driven by a Completion Strategy pushing for expeditious conclusions to all of its trials, the ICTY has struggled to find a balance between ensuring fairness in its proceedings and the need to expedite. The joinder ruling by the Appeals Chamber is by no means solely responsible for this imbalance,

but it was most certainly a slow-acting poison in the *Milošević* trial. Indeed, between its joinder decision and its ruling on the imposition of defense counsel well into *Milošević*, the Appeals Chamber did much to ensure the trial would outlast its subject.



## 8

# Joinder, Fairness, and the Goals of International Criminal Justice

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*What might a principled justification for joinder look like? Although there are many arguments about how joinder might affect prosecutorial or defense strategy, there has been less understanding of how the “single transaction” test also expresses a fundamental commitment to justice—namely, that it is more just to prosecute together crimes that were prima facie committed as part of a single overall design. This chapter considers the rationales for joinder raised in Milošević, and highlights the risk that too forensic an understanding of the “single transaction” test will distance international criminal justice from a fully contextualized understanding of events.*

The joinder of the three indictments against Milošević raised issues of procedure and fairness to the Accused, as Boas’ chapter cogently analyzes. Technically, the question is a priori one of factual and legal interpretation: Did the “same transaction” run from Croatia to Kosovo? However, the seemingly decisive character of that threshold is belied by the discretion the Chamber exercises—“crimes *may* be joined”<sup>1</sup>—so that although only acts forming part of a substantively unified transaction qualify for joinder, not all acts exhibiting such unity will in fact be joined. The questions therefore are also normative: Is joinder conducive to justice—and to what

sort of justice? Is the “same transaction” test the right one in the first place? Why is the test what it is?

Understanding the rationale for joinder will help us better apply the test for it: The technical and normative aspects should be closely aligned in deciding whether a given joinder should be authorized, and a finding that events were part of a single transaction is in itself a principled ground, all other things being equal, for their joinder. Conversely, many of the supposed benefits of joinder will not in fact materialize if no cogent case can be made for the existence of the same transaction.

A debate on joinder necessarily implicates the meaning of a fair trial. In this context, this chapter argues for a perspective focusing on the overall interests of international criminal justice properly conceived, rather than looking at the problem primarily from the point of view of the rights of the accused. A focus on fairness as such—the starting point for Boas—risks becoming abstract. In cases such as joinder, the content of a notionally procedural right is in fact significantly more complex than for narrower questions such as the right to know the charges. What is fair to an accused is not simply something that exists in the absolute, but is also necessarily a function of considering if particular procedures are reasonable in light of the overarching goals of the trial. If one loses sight entirely of these goals, then one has nothing by which to evaluate unfairness to the accused—or for that matter, fairness.

The problem with the joinder of the *Milošević* indictments, then—if there was one—must be that whatever disadvantage may have been caused to the Accused was not sufficiently justified in relation to some imperative demand of the criminal process considered as a whole. In that respect, the international criminal tribunals in general and the ICTY Prosecution in particular have not done an adequate job of arguing why joinder should occur: The issue has been allowed to hinge either on considerations of expediency or on the interpretation of a formal but vague threshold, while losing sight of the fundamental justification for the practice. This in turn has made it easier to portray joinder as unfair.

This chapter reconstructs the issue of joinder both from the point of view of the parties and through a variety of practical arguments made as to why joinder appeared desirable. It then turns to the point of view of international criminal justice more broadly to defend the single transaction test as itself following from a strong principle of justice. As

we will see, there is no absolute or a priori reason that joinder should be either desirable or undesirable from the point of view of defense or prosecution. Ultimately the test for joinder should be set by an overarching attention to the goals of international criminal justice, including its potential to produce a comprehensive accounting of the events in which an accused was involved. Fairness to an accused in this context is a function of whether these goals are interpreted in ways that do not unduly interfere with the presumption of innocence and the ability of the accused to defend himself. In short, there are inherent and instrumental reasons for international tribunals to prosecute together crimes that were indeed committed as part of a single transaction. Arguments that joinder should occur for other reasons or that it should not be allowed if, despite satisfying the test, it might cause some prejudice are besides the point and should not guide judges' decisions.

## **I. The Parties' Perspectives: Strategic Calculations and Practical Arguments**

Although joinders have always been sought by the Prosecution and very often resisted by the defense before the ICTY and other international criminal tribunals, there is no reason why this should always be the case. It is certainly possible to imagine circumstances in which the interests of defendants and prosecutors might reasonably lead them to agree that joinder is a worthwhile option—there have been cases in which defense counsel have not opposed motions for joinder<sup>2</sup>—or even that an accused would prefer joinder while a prosecutor opposes it. In *Milošević*, the general pattern more or less prevailed—joinder was an initiative of the Prosecution.

Milošević's attitude at his trial was ambivalent, but his general strategy suggested he too accepted that the events in the former Yugoslavia had a common thread—not his crimes, but Serb victimization—and he may, all other things being equal, have preferred a single trial.\* Milošević was defiant and exclaimed that “By adding up three lies, you will not get the truth. You will simply enlarge the lie itself[,]”<sup>3</sup> yet he never specifically challenged the idea that there was a unity to the events

in question—he simply disagreed with the Prosecution as to what that unity was. Milošević did not particularly object to being tried on all counts together as he saw them all as equally illegitimate.<sup>†</sup>

The *Amici Curiae*, reflecting their own ambiguous position, interpreted Milošević's comments on the indictment as an instruction to the Chamber “to deal with the matter as soon as possible[.]”<sup>‡</sup> Although on slightly different grounds than the Prosecution, the *Amici* argued in favor of joinder, implicitly conceding that the counts disclosed a commonality of *modus operandi*.

As for the Prosecution, its reasons for joinder have varied, in public and private, from high principle to strategic calculation. According to Chief Prosecutor Del Ponte, one of the reasons her team sought joinder in *Milošević* was “a basic principle in criminal law that an accused person has the right to be confronted immediately with all the crimes he or she is facing[.]”<sup>4</sup> It is unclear exactly what principle Del Ponte is referring to: The right to know the charges promptly upon being arrested is quite unrelated to joinder and the organization of trials, and certainly there is no defined right to joinder, which, as we have seen, is expressly discretionary.<sup>\*</sup> Del Ponte has also noted that her team needed to “buy time because the *Kosovo* element of the indictment was the least prepared of the three”<sup>5</sup>—although as the Prosecution led with *Kosovo*, it is unclear that joinder actually helped this goal.<sup>†</sup> The Prosecution's strategy was apparently adopted at the eleventh hour, as the idea of Greater Serbia—the unifying theme around which the joinder motion was based—was not in fact present in the *Kosovo* indictment and was not mentioned in connection with Milošević specifically in the *Bosnia and Croatia* indictments.<sup>‡</sup>

Although it is inevitable and understandable that parties will think in these terms, strategic calculations will rarely provide facially valid reasons for joinder, which should be justified on grounds more principled than lack of preparation.<sup>§</sup> There clearly were, however, at least some practical arguments in favor of joinder. One of the most debated issues arising in relation to joinder motions is the extent to which joinder would increase delays. Defendants have opposed joinder on the grounds that it would inevitably lengthen trials and thus jeopardize the right to a trial within a reasonable time.<sup>6</sup> But expediency is also a concern for the



Prosecution—not merely deference to the right of an accused, but recognition that the Prosecution has a role in safeguarding the “public interest in the efficient administration of international justice[.]”<sup>7</sup> The Prosecution is accountable for how it spends scarce international resources, and excessive time spent on one trial could prevent it from conducting others.

The question is largely one of court management and anticipating delays, but also of understanding when they might become unacceptable. Joining indictments in a single case seems less problematic in this respect than joining cases, which almost inevitably results in longer trials than separate trials for any one individual involved.<sup>8</sup> But there are cases in which joining indictments might significantly increase delays. If indictments are joined late in the process, after the defense team has prepared for trial based on a more limited initial indictment, or even after trial has begun, joinder may substantially push back the moment an accused actually goes to trial or cause a prejudicial interruption in an ongoing proceeding.<sup>\*</sup> But for indictments issued at relatively close intervals—or an accused who has only just been apprehended and finds them, as it were, all waiting for him—joinder is unlikely to be the only or principal cause of excessive delay, or indeed necessarily a cause at all. A host of other prosecutorial practices at international tribunals are more clearly associated with delays, such as issuing indictments with many overlapping or redundant counts, or calling large numbers of witnesses.<sup>†</sup> In fact, it seems quite likely not joining the *Milošević* indictments would have taken longer than holding a single trial, because of bottlenecks in the judicial calendar and inevitable delays between trials, the need to wait for several judgments, and repetition of time-consuming procedural steps, such as disclosure;<sup>8</sup> separate trials would have also required establishing some common elements anew in each trial rather than synthetically in a single one. The Prosecution was therefore probably right to argue that “[t]he right of the accused to a fair and expeditious trial would be enhanced by joinder of the Indictments since he could explore the overall history in a single trial where evidence would be more likely to be first hand.”<sup>9</sup> In the end, of course, as Boas explains, the Appeals Chamber accepted the idea that the trial would not be unduly difficult to manage,

nor unduly burdensome for the Accused, while keeping the possibility of a future severance open.<sup>10</sup>

The only thing successive trials clearly do more expeditiously than a joined trial is shorten the time before a first verdict, and provide an accused with a chance to more quickly clear himself of a part of the charges against him. The Appeals Chamber, for example, was worried about the “time which necessarily elapses between hearing the evidence and the final submissions and writing the judgment.”<sup>11</sup> But even this may or may not be something a given accused prefers, and will hinge on a variety of psychological factors and strategic motivations. In some cases, opposing a joinder may simply be an obstructionist strategy to prolong trials unnecessarily, whereas in others it might be a way for an accused convinced of his innocence to get a sense of early validation and victory. Neither seems to have been relevant in the case of *Milošević*. In fact, two of the *Amici Curiae* said that they had “no doubt ... that a single trial will serve the right of the accused to a fair and expeditious trial[.]”<sup>12</sup> A joined trial would indeed last a long time, but that is not necessarily because of joinder: any trial, or trials, covering the three indictments would have been long as, after all, Milošević was accused of a great many crimes.

Second, apart from the temporal aspect, the parties raised a number of arguments that went to the issue of fairness more generally. The *Amici*, for example, felt it would be of benefit to the Accused to not have to “face three separate trials, which can be a wearisome and burdensome task that can be damaging psychologically and damaging for health and a far greater burden than perhaps many people could satisfactorily deal with[.]”<sup>13</sup> A joinder, in such a context, was the more “humane” option for the Accused.<sup>14</sup> In response, the Trial Chamber found that “the fact that the accused would have to defend himself on the contents of three Indictments together would be onerous and prejudicial” and that this would be a reason to deny joinder.<sup>15</sup> Although they favored joinder, the *Amici* acknowledged that a mega-trial would in itself be grueling, perhaps because of the uncertainty surrounding its distant outcome.<sup>16</sup> But it is unclear why an accused would necessarily benefit from or even prefer three separate trials that—although each shorter on its own—would last longer together than a single joined one. It is worth contemplating the opposite scenario—one in which the pretrial, trial, and appeals phases of different trials overlap and

run simultaneously, in ways that would surely strain the resources and patience of the Accused.

A third type of argument emphasized the needs of other participants in the trial. The Prosecution was keen to argue that joining the indictments would principally benefit witnesses and victims, as a matter of court management. Del Ponte emphasized before the Trial Chamber that “the victims and witnesses would best be protected if they were required to give evidence only once[.]”<sup>17</sup> Nor was this only a matter of protection—it was understood that a number of witnesses were not in fact victims, but high-level insiders who might not be inclined to testify several times.<sup>\*</sup> More generally, Del Ponte argued that it was in the interest of all victims, not just witnesses, to have a joint trial, as “the victims have the right to be able to have a single trial.”<sup>18</sup>

This argument is problematic, however. Partly, this is because of the characteristic way in which the concerns of victims are made decisive in a context in which the rights of the accused should be foremost<sup>†</sup>—certainly, it is curious to find arguments for joinder based both on a solicitude for a defendant’s rights and the interests of victims. But partly, it is because it is not clear that the victims from the former Yugoslavia necessarily had common views on this, or any, matter. For example, it is not obvious that victims of persecutions in Kosovo particularly wanted to tie their fate to that of, say, victims of genocide in Bosnia, or vice versa. Croat and Bosniak victims might think that the joinder would further delay a trial or confuse quite different situations; Kosovars might worry that, in relation to the massive campaign of ethnic cleansing in Bosnia—to which charges of genocide were attached—the crimes committed against them would not appear as grave, and so on.

This is speculation, of course, but so is it when such arguments are invoked by the Prosecutor to make the case for joinder: It is very easy to speak in the name of the voiceless victim. As Boas has remarked elsewhere, “it is difficult to imagine that it is possible to satisfy the legitimate needs and interests of all the victims of three conflicts over eight years, particularly in the context of a single criminal trial.”<sup>19</sup> In fact, the sprawl induced by joinder may have worked directly against this goal: “[U]ltimately the prosecution would do little justice to victims by



presenting a massive case in which it was unable to lead sufficient evidence to explain, let alone establish many of the alleged offences[.]”<sup>20</sup>

A fourth argument about joinder is a strategic calculation about evidence: a hope (or a fear) that the proof in each segment of a joined indictment will have spillover effects on the other segments, and that proof of the overall design—formally the rationale for joinder—might even serve as a substitute for proof of the particulars. In fact, this may have been the Prosecution’s agenda in seeking joinder in *Milošević*—that is, as a way of making sure that the indictments had a mutually reinforcing effect, and of compensating for the intrinsic deficiencies of each one taken separately. If Milošević committed crimes in Croatia and Bosnia, it might not be such a big step to believe, in the context of a joint trial, that the same person would exhibit the same sort of ruthlessness a few years later in Kosovo, or vice versa.

This danger of negative inference from the mere fact of joinder is linked to its ambiguous status: Joinder is largely seen and presented as a procedural issue, but it may also have a prejudicial substantive impact, in that it is based on a substantive claim—that these events constituted the “same transaction”—which may seem to validate a particular prosecutorial theory about those events before the trial has even begun. Procedurally, of course, there is no such inference, because it is not the actual truth but the plausibility of the claim about a single transaction that is at issue, and the formal solution is for joinder to be decided on “the basis of the factual allegations as contained in the indictment”<sup>21</sup> alone, a point made clear by the ICTR.<sup>22</sup>

But it may be awkward, and difficult, for a chamber to consider if alleged crimes constitute part of the “same transaction” without reaching beyond the pure form of the indictments to substantive claims about the events in the former Yugoslavia. The Appeals Chamber insisted that in ruling for joinder it was merely engaging in a form of case management that would—or should—in no way prejudice a verdict.<sup>\*</sup> Yet the debates before the Trial Chamber reveal that it was almost impossible not to deal, at this preliminary stage, with substantive issues—such as whether there was a plan for a Greater Serbia, which may well have gone to the heart of the trial.<sup>23†</sup>



In this sense, joinder is not neutral in its evidentiary and normative effect. In portraying certain acts—each of which is supposed to be separately amenable to trial—as part of a pattern, joinder may well make the accused seem noticeably more Machiavellian than he might otherwise appear. There is a dark, ominous tone to the suggestion that, from the first skirmishes in Croatia to the last executions of Kosovar Albanians, Milošević was animated by a single calculated idea. The huge indictment that resulted from the joinder spanned a period of almost eight years, three very distinct zones and conflicts, and dozens of counts. In this respect, joinder could have the effect of focusing the trial on the person behind the acts rather than the acts themselves, in ways that highlight the monstrosity of personal responsibility because so much seems to flow from a diabolical master plan. After all, parts of the separate indictments might have been plausibly joined to other cases—*MOS*, *Martić*, or *Karadžić* for example<sup>\*</sup>—but once the three indictments were joined, nothing united the disparate parts of the Prosecution’s case other than the person of Milošević, the only individual to have been assigned responsibility for all three of the main theaters of atrocities in the former Yugoslavia.

Still, this is a question of degree, and it is not as if separate trials would have totally eliminated claims of connected evil: Nothing would have prevented the Prosecution from stressing this aspect in its arguments in separate trials, and one may wonder if it would make such a difference to our assessment of Milošević’s moral stature if he were to be seen merely as the perpetrator of untold atrocities in three relatively unrelated contexts. He might then appear for what, to many, he was—less of an ideologue with a master plan than a ruthless opportunist<sup>†</sup>—but that is hardly exoneration. At any rate, this was less of an issue because, as we have seen, *Milošević* himself thought he had done nothing wrong, did not seem to oppose the idea of contesting a unified trial narrative, and made no significant attempt to argue for separate trials.

Fifth, and finally, broader and more systemic grounds were available, which the Prosecution hinted at, although in a haphazard way: Rather than simply following an uncontextualized chronology, joinder might advance one of the purposes for which the ICTY was created by promoting international peace and security.<sup>24</sup> According to Del Ponte, joinder might do this by making it possible to “know the truth as to the real responsibilities of the accused Milosevic, the continued criminal

responsibility in time and with regard to facts without any interruption” something that would “contribute to reconciliation and peace in Yugoslavia[.]”<sup>25</sup>

Of course, it is not obvious that a single, inevitably protracted trial would do much to dispel the impression, deeply felt in the former Yugoslavia, of international justice as an ongoing circus, as described in the chapters by Trix, Swimelar, Meierhenrich, and Bieber. On the contrary, Milošević’s lingering influence in the region and the threat it arguably posed to international peace and security might have been better countered by a rapid, focused prosecution for one set of crimes; it may be, in other words, that it is the first conviction for crimes against humanity that destroys much of the aura of a politician, rather than the complete record, however desirable that record may be for other purposes.<sup>‡</sup> Moreover, there is something problematic—at least, instrumental—about the idea of using joinder for a purpose that lies some steps removed from those of justice itself. Still, as we will see, the idea of framing issues of fairness to the accused or manageability of the trial within a vision of the overall goals of international criminal justice is definitely a step in the right direction.

All of these arguments might be good reasons for a prosecution to want joinder—but equally these might be good reasons for a defendant to want joinder, or for either to oppose it. And none of them are or should be conclusive in terms of deciding if a chamber should grant joinder—none of them satisfactorily answer that normative and policy question. The real case for joinder ultimately cannot be assessed purely from the perspectives of parties—from their strategic calculations or practical arguments—but rather on the basis of the overarching interests of international criminal justice.

## **II. The International Justice Perspective: A Principled Defense of the Single Transaction Test**

Neither side in *Milošević* entirely captured why joinder might be warranted. Ultimately what was needed to answer that question was a more holistic understanding of why joinder might make sense at a deeper level from the point of view of international criminal justice per se, an

issue not reducible—in this case or any other—to either a prosecutor’s or defendant’s perspective. A stronger criterion for deciding if joinder is in the interest of international criminal justice would involve a more principled defense of the standard indicated by the formal rules, namely that the crimes to be joined must have been committed as part of the same transaction. As we will see, the “same transaction” test is also based on a understanding that, for the purposes of international criminal justice’s exemplarity and social utility—as well as for the victims’ sake—events with a fundamental unity of inspiration should be tried singly.

As such, more than a purely technical evaluation is needed to understand the appropriateness of joinders. This differs slightly from Boas’s key suggestion—expressed perhaps most clearly and forcefully in his book on the trial—that international criminal trials’ “purpose is primarily forensic in nature—that is to determine the guilt or innocence of individuals for their role in atrocities.”<sup>26</sup> This is undeniably the core, conventional goal of criminal trials, but international trials have a range of other goals, such as restoring international peace and security, establishing authoritative records, and facilitating transitional justice that make demands of their own on the trial. These broader goals set international trials apart and warrant careful attention to how these trials can pursue both their forensic goals and other social purposes. Indeed, the constant tension between a strict, forensic understanding of their mandate and one more geared toward transitional justice has yielded one of the most productive dynamics in the international tribunals’ history. Ultimately, it will prove not only difficult but dangerous for tribunals to ignore the ways in which they characterize historical events, even as they seek to focus only on issues of guilt or innocence: Tribunals assign culpability to individuals, but guilt or innocence are terms informed by the embeddedness of individual behavior within highly complex social events. Although the traditional view is that international tribunals should not engineer trials to artificially manufacture transitional justice outcomes, they should also not be oblivious to their historical and political surroundings, nor forgo obvious opportunities to render meaningfully contextualized justice.

Context matters in all criminal trials. Imagine, in the domestic setting, the trial of an individual known to have killed several people, one by one at regular intervals. It may be that each murder is entirely unrelated, but if



the crimes taken together arguably disclose a particularly murderous temper or the profile of a serial killer, then prosecuting them separately might miss a crucial dimension both of the defendant's culpability and of what has actually happened. In the international context, these risks are even greater. Consider a classic international example *a contrario* in which the unity of crimes was very significant. Suppose the defendants at Nuremberg had been tried separately for each act of aggression—the *Anschluss*, the dismemberment of Czechoslovakia, the invasions of Poland, Belgium, France, and so on. There might have been practical reasons for doing so—such as concern that prosecuting all these crimes together would delay judgment and render the trial unmanageable—but a crucial dimension of Nazism as a fundamentally aggressive, militaristic, and expansionist ideology would have been lost: The accused would have appeared as repeat offenders rather than as architects of a systematic plan to dominate Europe. The *Nuremberg* trial uniquely highlighted this dimension of the regime, and made a decisive contribution to international and transitional justice as a result.

This same risk obtained in the *Milošević* trial. Let us imagine, for example, that the Prosecutor, in an effort to obtain a quick conviction, had decided to indict Milošević only for the events in Kosovo, and even there only for one particular massacre. The trial would have proceeded swiftly and, from a purely forensic point of view might have been impeccable, restricting itself to the only question actually asked, namely whether Milošević was legally responsible for these particular acts. However, there would have been a broad outcry that such expediency came at the price of ignoring or downplaying the global picture and that, under the pretext of establishing Milošević's guilt for some events, it failed to call him to account for others.\* Alleged victims of *Milošević* in Bosnia and Croatia would have claimed that they were being shortchanged, not least as offenses committed against them had occurred earlier, and they had been waiting for justice for so long.

The very fact of prioritizing certain indictments—although done on impeccably forensic grounds—would inevitably have been interpreted as an ideological reading of the conflict, which would have questioned the impartiality of the Prosecution; at least joinder puts all crimes in common perspective, treating them on an equal footing. In our hypothetical case, there would have been nothing the Chamber could do—it is, after all, the



Prosecutor alone who brings charges—whereas in *Milošević* the Trial and Appeals Chambers had the issue before them. Still the example makes clear that an exclusive focus on purely forensic justice risks sacrificing the point of the noun for the sake of the adjective. Perhaps the Appeal Chamber had this broader conception of justice in mind when it ordered joinder.

The situation concerning the joinder of indictments is more subtle than our hypothetical example, but it raises similar problems about the balance between forensic and what we might call comprehensive justice. As Williamson's and Bassiouni's chapters imply, once the *Kosovo* indictment issued, it was all but inevitable that the other two indictments would be brought, and the only question was whether prosecuting them separately might create a risk that significant elements of Milošević's overall guilt would be missed or distorted. In this respect, it often seemed that the single transaction test was only the incidental legal and factual battleground for debates whose real stakes played out over trial manageability and delays.

But the notion of a single transaction should not simply be seen as a pretext for a prosecution to do something that it fundamentally wants to do for other reasons, or as a way to minimize curtailment of an accused's rights. Rather the idea of the same transaction in itself encapsulates a notion of justice, and a simple, intuitive one at that: it is better to try together acts that are fundamentally related, just as it would be wrong to try together acts that were indeed unrelated. In this respect, the single most significant reason for prosecuting certain crimes jointly is not that it saves time or that it is fair to an accused or less burdensome on victims in an abstract way, but that the crimes do indeed display a historically significant level of unity making it appropriate and desirable to try them together.<sup>27</sup> The formal threshold for allowing joinder, in other words, is also the best argument in favor of joinder. If there is indeed a single transaction, then it becomes much harder to argue that the rights of the defense are being impinged even if the resulting trial is longer, as a very strong argument for a single trial exists.\* The converse is, obviously, also true. Of course, these are matters on which prosecution and defense may well disagree, but this does not change the fact that it is on such grounds that the overall correctness of joinder should ultimately be assessed.

This reasoning is general, but applies to international trials with an even greater sense of urgency: Adequately and accurately framing the contextual dimension of a complex set of crimes is, if anything, more important for ascertaining individual guilt because evidence of planning or systematicity is essential to many international offenses, including genocide, persecution, crimes against humanity, and crimes committed under JCE theories.<sup>†</sup> Thus joinder may make sense from a forensic point of view because it helps highlight a certain pattern, legally relevant motive, or a *modus operandi*.

But even more important, joinder speaks to the need to ensure that international criminal justice not reduce all history and politics to forensics. As our thought experiments concerning *Nuremberg* and *Milošević* suggest, highlighting links between different crimes and indictments may yield profound lessons for our understanding of the processes involved. Joinder has an impact on the ability of international tribunals to render justice, in the fundamental sense of doing justice to what actually happened. Beyond criminal justice lies justice *tout court*, and the struggles of international tribunals to produce not only verdicts about individuals but also more general narratives of the broader events involved.<sup>28</sup> Such reasons might be mitigated by countervailing factors, but they are not reducible to the merely forensic, and—at least given the broader purposes we evidently do attach to the project of international criminal justice—should feature prominently in any defensible theory of joinder.

This aspiration to elevate international criminal justice above a narrowly understood forensic approach may explain the fact that both Prosecution and Appeals Chamber distanced themselves from a narrow, clinical reading of “transaction,” relying more on the notion of a “common scheme, strategy or plan,”<sup>29</sup> as something that could unfold over time. This was based on a largely correct technical interpretation of Rule 49, according to which acts need not have been committed “together” in time (as the Trial Chamber had understood it), but should, when “considered together as a whole[,]” form part of the same transaction.<sup>\*</sup> The Appeals Chamber accepted the idea that events forming one transaction could include a common scheme, strategy, or plan with a long-term aim that unfolded for the greatest part of a decade; the forcible removal of the non-

Serb civilian population from areas over which the Serbian authorities wished to maintain or establish control was, then, such a scheme.

We need not enter into the details of whether Milošević's alleged crimes actually displayed that unity. The point is that this approach to joinder yielded a factually contestable claim that raised some of the very questions that any international trial of Milošević would have to raise to be meaningful. The rationale for joinder was coherent: In effect, it equated the attempt to extend Serbian sovereignty over areas of Bosnia and Croatia by criminal means with the attempt to maintain Serbian sovereignty over Kosovo by similar means. The Trial Chamber—focused on the passage of time and the use of proxy forces—did not accept that argument, but the Appeals Chamber—having loosened the test—did, finding that in all cases “the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia.”<sup>†</sup>

Implicitly, the two Chambers differed not only in their formal test but in their approach to international law: For the Appeals Chamber, the fact that some actions took place within Serbia, and others across an international frontier, seemed less important than that all three episodes were part of an all-too-familiar pattern of violence against minorities in the former Yugoslavia. In emphasizing this unity, the Prosecution made, and the Appeals Chamber accepted, a characteristically cosmopolitan claim, one that stressed the commonality of criminal inspiration and the consistently gruesome results. The Trial Chamber, by contrast, had exhibited a more traditional and formal internationalism, making much of the fact that some events were international whereas others were, strictly speaking, domestic—but in doing so forwent the opportunity to make the trial responsive to its larger purposes.

In practice, joining the indictments had the strategic and procedural effect of setting the bar for the Prosecution quite high, because it did in fact portray Milošević's actions from the early to the late 1990s as part of a single, broad criminal strategy. Perhaps the Prosecution could have made a better case, for example, by not referring to Greater Serbia in relation to Kosovo—an expression that made the Belgrade-based *Amicus Curiae*, Branislav Tapušković, understandably apoplectic.<sup>30</sup> But that is a critique of the Prosecution's strategic choices and the ultimate strength of the evidence, not of joinder as such: the fact that the phrase was not quite apt



does not mean that there was not a certain unity behind Milošević's actions (or, of course, that there was no such plan in relation to other areas).\*

Claims about this unity are contestable, but deciding upon their truth or falsehood, rather than eliding them from the juridical process for the sake of expediency, is of the essence of what it means to do justice after episodes of complex violence. Joinder may achieve all the other things claimed for it—greater speed, fewer constraints on victims, and so forth—but it is not justified by these things. There is no substitute for joinder actually being based on a credible, contestable narrative of what has gone on. If such a narrative is available and persuasive on its face—whether or not it proves true following a trial—then joinder seems inherently justified, especially where the challenges it creates for an accused are more than compensated by the benefits of a fuller and more responsive engagement with the process of doing justice.† In fact, confronted with a situation that displays a high level of factual unity, it is probably only in rare instances that the judges should exercise their discretion to not allow a joinder. The fundamental need to present certain criminal episodes for what they are—whatever that proves to be—should trump, or at least weigh more heavily than, whatever other procedural or strategic complications joined trials may engender.

## **Conclusion: The Limits of Single Transaction Analysis and Complex Historical Events**

Although perhaps strategically sound when it was taken, the decision to seek joinder in the case of *Milošević* of course proved, in retrospect, a mistake. A single trial on one indictment might conceivably have been concluded before Milošević's death, giving the Prosecution—or Milošević—at least one chance at winning a particularly important case. A conviction, if that had resulted, could have provided a sense of justice to at least some of the victims—most likely those from Kosovo\*—and indirect gratification for victims in other theaters, in that Milošević would suffer the stigma of having been condemned for some international offenses, which would have made the victims' case seem more historically credible.



In many ways, the pursuit of a mega-trial was consonant with a broad prosecutorial strategy that emphasized exhaustive coverage over quick convictions, sometimes at the cost of obtaining neither.<sup>†</sup> Still, blaming joinder—and implicitly, therefore, the Prosecution and Chambers—for the premature termination of the *Milošević* trial, as Boas seems to do, is a bit unfair. Given the sheer uncertainty of such events, prosecutors are probably well-advised to develop their strategies on the basis of more fundamental considerations, and judges must respond accordingly.

Still, despite the fact that a principled argument could be made for prosecuting jointly all the crimes of which Milošević was accused based on the single transaction standard—and that reliance on this standard is preferable to the casuistry of costs and benefits—joinder does raise questions about the limits of international criminal law, or at least the awkwardness of dealing with mass political crimes using a language that is still by and large borrowed from domestic criminal law. What constitutes a “transaction” is hardly a settled term of art: Although the parties and Court suggested several meanings of the term and some case law,<sup>‡</sup> these inevitably arose in municipal contexts that bore little relation to the sort of complex sequence of events alleged in *Milošević*.

At times, the Tribunal’s reasoning on the meaning of “transaction” in *Milošević* seemed to hinge on such minute and fortuitous questions of statutory interpretation—the discrepancy between the French and the English versions, for example—as to risk missing the issues of principle. To describe almost a decade of Milošević’s leadership of Serbia and Yugoslavia and criminal acts committed by his regime as part of a “transaction”—a word with origins in private law and suggestion of an “exchange”—was bound to be reductive, and thus bound to fail in rendering the enormity of what went on, its historicity and its complexity.

Indeed, perhaps the problem is the focus on the notion of transaction, rather than on whether Milošević’s conduct exhibited a fundamental unity more generally. The danger is that a notion introduced into the Rules by the judges and with no significant pedigree in the Statute or ICL generally becomes the litmus test for deciding if indictments should be joined, to the detriment of a more meaningful engagement with the substantive rationale. The Appeal Chamber’s interpretation, requiring less factual connection, was an improvement, but even so, if Prelec is right, the idea of a “plan”—even one whose parameters changed with time—might have

proved a semantic stretch. This need not always be the case, and there are indeed examples of archetypal plans—most notoriously the *Wannsee* conference. But international criminal justice also has a long record of yielding to the temptation of seeing a “master plan,” from the very broad-ranging accusations of conspiracy to wage war raised in the *Tokyo* trials to the failed suggestion that the Rwandan military was involved in a conspiracy to commit genocide prior to 1994.<sup>31</sup>

Did Milošević have an actual plan in the early 1990s to create a Greater Serbia or annihilate non-Serb minorities? There is a real risk that this notion claims too much. Milošević, like most significant actors in the breakup of Yugoslavia, knew that the issue of nationalism would have to be dealt with, and, when the time came, certainly had no doubt about whose side he was on. But his views about what to do were inevitably shaped by evolving events, and he could not have predicted the entire chain of events leading to 1999. The alternative view is that Milošević probably had less of a plan than he had certain views about the role he might play in what came after Yugoslavia, and ideas about the nature of nationhood and Serb identity.\* In the process, he responded to events with the predictable ruthlessness of someone whose appetite for power was immense, whose political views came to be predicated to a large extent on ethnic nationalism, and who had a propensity to think that the ends justified the means—a propensity Prelec describes in his chapter. This hardly makes Milošević’s behavior less grave or his actions more justifiable; in thinking about joinder, it does not impugn the fundamental unity of his behavior across the decade. It does, however, betray the inadequacy and reductiveness of some of the terms and tropes used by ICL, which encouraged the Prosecution to ascribe an almost conspiratorial single-mindedness to the complex strategies of a viscerally political animal such as Milošević, vying for domination and survival amid the rapidly changing landscape of Yugoslavia’s collapsing structures.

In thinking about joinder, it may be that, while retaining the single transaction standard as a guiding thread, international tribunals such as the ICTY should more explicitly consider the interests of justice. The Chamber’s discretion, foregrounding as it does issues of forensic practicability and convenience, should be supplemented by a more explicit effort to account for the ramifications of joinder on the broader goals of international justice: fairness to various local constituencies, ability to

develop a comprehensive record, and consequences for international peace and security.\*

The tendency to avoid—at least explicitly—deeper normative engagement with joinder’s effects through wordplay surrounding the notion of a “single transaction” is not an accident. ICL is a method for dividing complex realities into the innocent and the criminals, and for treating the latter as uniquely guilty of committing atrocities, regardless of context, structure, or motives. What international criminal justice as a project does not want to do, precisely, is to indict certain ideas and politics, as opposed to certain acts committed by individuals. To do otherwise would risk weakening the precarious individual agency so central to ICL’s functioning. Milošević was a criminal entrepreneur who provoked the violent death of tens of thousands, but in legal terms, his particular form of post-Communist nationalism was merely a motive or an element of context. ICL has nothing to say about ethnic nationalism as such, but instead insists that such motives are inconsequential in relation to the sheer personal evil of Milošević, at least in relation to the fact that he committed the crimes he did. Tropes and doctrines of “conspiracy,” “single transaction,” and “plan” reinforce this sense of a dark but individual scheme, rather than, say, examining the complicity of broader populations and the role of ethno-politics.

The joinder of the *Milošević* indictments was entirely justifiable as long as it was based on a plausible view of the unity of the criminal allegations against him, even though it may well have had the unfortunate effect of depriving the international community of a verdict. But the current transactional test to evaluate the appropriateness of joinder—whatever its forensic value—distracts the law, and us, from the fundamental unity behind Milošević’s alleged crimes, which was, if anything, not only temporal or even personal but, at its root, ideological and political.

## 9

# Difficulties for the Participants

Indictment Correct, Trial Impossible

CARLA DEL PONTE

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*This chapter identifies the difficulties confronting the participants in the trial—judges, defendant, and prosecutors—as the main point of criticism and cause for the trial’s unsatisfactory termination. What role did the judges’ prior experience in conducting trials play? How did the defendant’s self-representation affect the trial? Could the Prosecution have proceeded differently and presented evidence in a more efficient way? Answering those questions leads to the conclusion that in spite of a correct indictment, under the circumstances the conduct of a fair and expeditious trial was put at risk. Milošević’s self-representation did not comply with the criteria of a fair defense, while the time-consuming procedure and the dreary, sometimes unnecessary presentation of evidence prolonged the trial in such a way that one is tempted to say: Milošević’s death, after more than four years, put the trial out of its misery.*

## **I. Investigation and Indictment: Obstacles and Strategies**

### **A. The situation of the Milošević case in 1999**



When I arrived at the Tribunal to lead the Prosecution in September 1999, Milošević was not being actively investigated for crimes committed in Bosnia and Croatia, but only for those in Kosovo. The *Kosovo* indictment has been issued earlier that year, while that conflict was ongoing. At that time there had been enough evidence in the *Kosovo* investigation to obtain a confirmation of the indictment against Milošević. However, after my arrival I was advised that the evidence of crimes committed in Kosovo that had been collected was not yet sufficient to obtain a full conviction at trial. I therefore decided to continue the investigation in order to finalize the case.

I also began to look at the question of expanding the indictment to include Bosnia and Croatia. I consulted with my senior staff—including the Deputy Prosecutor, chief legal advisor, and others—but they did not want to investigate the crimes committed in Bosnia and Croatia, even though Milošević's main criminal responsibility was evident in those two cases. They said that because he was still president of the FRY, he would never be transferred to the Tribunal, and it would therefore be an unnecessary workload.\* In fact we were very busy with ongoing cases, with some accused in detention.

After I had examined all the evidence just coming from other investigations and trials, in spite of these views I decided to open the investigation against Milošević for the crimes committed in Bosnia and Croatia. I persuaded my staff with the argument that we ought first to collect all the evidence available from other cases and then fully investigate the crime base in Bosnia and Croatia. In the meantime, we were also working to obtain access to Belgrade to investigate Milošević's criminal responsibility at its source. My aim was to be ready if and when Milošević would be arrested and transferred to the ICTY, which did come to pass later on. We therefore started active investigation.

## **B. The difficulties of investigating—in particular in Serbia**

The investigation was enormous and enormously complex. The acts in question occurred in three different jurisdictions: Croatia, Bosnia, and Kosovo (still *de jure* part of Serbia though outside Belgrade's control since June 1999). Collecting key evidence and recruiting meaningful insider witnesses required investigative and diplomatic work in a fourth

jurisdiction, Serbia, where men who had ordered and committed war crimes were still working in the SDB, the VJ and the criminal networks with which these governmental organs had been interlocked.

At that time we were not able to investigate in the FRY: We had no office, no access to archives, and we could not even physically enter the country. So all our investigations were directed toward Bosnia and Croatia, and focused essentially on the crime base, which meant interviewing witnesses and survivors and searching for objective facts. However, we could not investigate the direct responsibility of Milošević because the most important evidence for that was in Belgrade, to which we had no access. Furthermore, we did not have any insider witnesses who were disposed to testify at that time—although the original strategy with the *Kosovo* indictment had been to leverage insider witnesses.<sup>†</sup>

Still, there was another possibility: We could try to acquire evidence against Milošević through plea agreements and cooperation in other cases. For example, the Croatian Serb leader Milan Babić was cooperating, which was very important for collecting evidence against Milošević in the *Croatia* case.<sup>‡</sup> And so, slowly—because he was still president of the FRY and would not be transferred to the Tribunal anytime soon—we began to investigate Milošević. It was not until the autumn of 2001 that the Trial Chamber confirmed indictments against him for Croatia and Bosnia.<sup>1</sup>

Outside the Prosecution few knew or understood the challenges that arose during the preparations of the *Milošević* trial: the complexities of the case, Milošević's tactics and antics during the pretrial phase, clashes of personality and culture within the office, difficulties recruiting insider witnesses and securing the testimony of high-ranking foreign leaders and diplomats, the obstruction by Koštunica and his supporters—all these factors tested the mettle of the team's members. But we achieved it.

### **C. Legal discussions: How to obtain an indictment**

Apart from the practical and political difficulties of investigating, the ICTY statute—in particular the ways it described participation in crimes<sup>2</sup>—also posed a problem and led to further discussions with my senior staff. The statute's provisions worked well enough for the immediate perpetrators of crimes, generally the lower-ranking shooters, but were not well suited to deal with the way senior political figures participated in

those same crimes. We did not maintain that Milošević personally ordered individual atrocities in Bosnia and Croatia; rather we argued that he devised a broad criminal plan at a strategic level and implemented it, using his authority as president of Serbia and later of the FRY.

In the end, we decided to apply the doctrine of “common purpose,” which the *Tadić* Appeals Chamber had accepted<sup>3</sup> and which became known as JCE. This had proved an effective method of prosecuting high-level perpetrators who participated in crimes at a strategic level.<sup>4</sup> All this discussion consumed a lot of time, but it was extremely important for me to find the right approach and persuade all my collaborators that this actually was the best solution.

Our principal strategy for the trial was to join the three indictments, relying on a JCE theory whose unifying element was a plan to establish a Greater Serbia.<sup>5</sup> This decision was not only strategic, but also aimed to speed up the trial: fewer witnesses would be needed, the verdict would be consistent, the Accused himself would benefit from it in terms of fairness and expediency, and in general joinder would contribute to greater judicial economy. As Boas and Mégret discuss in great detail, the Trial Chamber only accepted the motion in part, denying it for *Kosovo*, but the Appeals Chamber ordered joinder of all three indictments.<sup>6</sup>

## **D. Legal discussions: Genocide in particular**

There were many other discussions within my Office concerning the particular charges to bring in the *Milošević* case. This was not only a question of establishing Milošević’s authority, but of characterizing his responsibility. For example, the crimes committed at Srebrenica were properly characterized as genocide, a view that had been confirmed by the Appeals Chamber,<sup>7</sup> and if Milošević were involved there, as we believed he was, we had to consider whether to qualify his involvement as genocide.

There was evidence that Milošević had logistically and financially supported Ratko Mladić, Colonel General of the VRS, and Radovan Karadžić, President of the RS from 1992 to 1996. There was also considerable evidence that Mladić and Karadžić had gone to Belgrade to discuss these matters with Milošević, who sent them material support to help conduct the war against Bosnian Muslims and Croats.



Of course we did not have a “smoking gun” that would have proved Milošević’s participation in those crimes—including the genocide at Srebrenica—nor could we reasonably count on finding one, but I was sure that we would find enough evidence to corroborate the indictment; so, at the end of many discussions, I decided to put genocide in the indictment. My main strategic argument was that we would continue the investigation, and I was convinced that, once we got access to Belgrade, we would find the further proofs we needed.

In addition, I had an institutional reason for proceeding with the genocide charge. I felt it could not be possible that a single person—in this case me, the Prosecutor—could decide that Milošević was innocent, which would have been the effective consequence had I not insisted on including genocide in the indictment. My job as Prosecutor was to put forward the strongest case possible, including through the framing of the charges, and it must be the Chamber that decided if Milošević was guilty or not; this could not be the Prosecutor’s responsibility. We had *prima facie* evidence of genocide, and I was therefore duty-bound to present the charges to the Trial Chamber to judge. I informed all my senior trial attorneys that I would not allow a prosecutor to preempt the judges and make the final decision that Milošević was not guilty of genocide or of complicity in the events at Sarajevo and Srebrenica. The same reasoning led us to include many representative municipalities in the indictments in order to be as inclusive as possible, not only to give the case every chance to succeed but also to protect victims’ right to justice.

I feel this approach was ultimately vindicated by events at trial. After the Prosecution rested, the *Amici Curiae* asked the Tribunal to declare Milošević innocent on a number of counts (under the Rule 98 *bis* procedure, which Nielsen and Waters discuss), but the Tribunal decided that there was enough evidence to maintain each charge—including the accusation of genocide—and hold them over to the defense phase.<sup>8</sup> This decision was very important and confirmed my view that arguments for including genocide were strong and merited a full hearing at trial.

Thus, although there were considerable practical, political, and legal obstacles to a single, expanded indictment covering Kosovo, Croatia, and Bosnia, my staff and I confronted those challenges and ultimately produced a plausible, defensible indictment that, if properly pursued and heard at trial, could have led to conviction in a fair proceeding.



## **II. Trial: The Difficulties Confronting the Participants**

Despite beginning with a serviceable and defensible indictment, however, the trial encountered significant obstacles. Indeed the judges, the Prosecution, and the Accused faced difficulties that ultimately undermined the conduct of the trial.

### **A. The Chamber**

The judges confronted a number of obstacles, some of their own making and some a function of the environment in which they operated: The hybrid rules of procedure, the judges' lack of experience, their exaggerated tolerance of Milošević's behavior, and their passivity all contributed to delay and distraction.

#### **1. The Tribunal's defective Rules of Procedure and Evidence**

The *Milošević* trial was too long, and steps should have been taken to shorten it considerably—no trial should last for four years.<sup>\*</sup> The main factor contributing to the trial's length was the Rules of Procedure and Evidence or RPE, which were primarily based on the common law system.<sup>9</sup> This common law orientation meant that the Chamber could not intervene as robustly in the trial and that much more time was needed to present evidence. In the course of the trial several rules deriving from the civil law system were introduced, with an eye to speeding up proceedings,<sup>10</sup> but the trial was still too long. A comprehensive revision of the RPE to reconcile significant differences between the civil law and common law approaches to criminal procedure could have shortened the trial; in particular this would have made it less necessary to prove again the same facts that already been proved in other trials and hear the same witnesses over and over again. Of course the *Milošević* Chamber was not directly responsible for the RPE, but because the judges of the ICTY were collective authors of their own RPE, they bear much of the responsibility for the Rules' tendency to promote extravagantly long trials such as *Milošević*.

## **2. The judges' relative inexperience in conducting international trials**

A judge's past experience in conducting trials is of great importance, and this factor presented a general problem not only in *Milošević*, but in all cases, because of the novelty of the ICL process and the consequent relative lack of experience of all the judges in ICL's particular culture and context. In general, an experienced judge will find it easier to be firm and confident in his decisions, without losing time on less important details; this is even more true in an international court such as the ICTY, where many of the issues are entirely novel. However, for a judge with less practical experience it is even more difficult to adopt a firm attitude and not lose time in discussions; he will want to listen to every possible argument, and be overly cautious in taking decisions. An accused will naturally perceive the judge's hesitation and take advantage of it. In general, efforts must be made to ensure the recruitment of competent and experienced judges—tribunals need more experienced criminal judges and fewer legal scholars.

## **3. Exaggerated respect for the Accused**

In *Milošević*, the judges' relative inexperience was of particular importance because it was the first time a head of state had appeared before an international tribunal since Nuremberg. Milošević was treated with exaggerated respect during the trial. At the beginning of the hearings he would always be asked if he was feeling well, if he was comfortable with the conditions in prison, and if he agreed to stay in court and attend the trial. So much time spent talking about the well-being of the Accused: to me—as the effective representative of the victims—this overly solicitous attitude toward Milošević seemed like a lack of respect for the victims and ridiculed their horrible suffering.\* All these issues should be discussed between the parties—if needed—outside the courtroom, but Milošević refused, and with no appointed defense lawyer it was impossible to do so without him. Whatever contributions the Registry's *Pro Se* Office made to ease these interactions, which Anoya describes in her chapter, they were not sufficient to mitigate this problem.

This level of solicitousness and deference continued throughout the hearings. The judges were very careful and attentive with him; I recall that the presiding judge, Judge May, once mentioned in court that he allowed

Milošević more than he would have allowed a professional defense lawyer because Milošević was defending himself. For me this constituted one of the weaknesses in the attitude of the judges because it allowed Milošević broader scope to conduct a political defense and to prolong the trial. I remember that Milošević, when speaking to the presiding judge would call him simply “Mr. May” in a deprecating way.<sup>11</sup> One time, I told Judge May that I would appreciate it if Milošević called him “president,” but in May’s opinion this was not of importance.

#### **4. The judges’ nonintervention**

It was also a serious problem that the presiding judge did not intervene more in the trial. This was not necessarily a function of inexperience or a theoretical orientation; on the contrary, it was a cultural aspect that arose precisely because of the common law structure of the Tribunal and the common law experience of the presiding judge: Judge May was an English judge, and in the common law judges are not used to intervening much. But in the *Milošević* trial, this professional reticence would prove to be of great relevance, because Milošević did not defend himself in the customary manner of an English court: Instead he gave political speeches, which the judges did not intervene to stop. From the very beginning of the trial, the judges allowed him to make all the political speeches he wanted.

#### **5. Wasting time in unnecessary discussions and evidence reviews**

A lot of time was wasted through unnecessary discussions about procedural rules, resistance to admitting adjudicated facts, and overly generous tolerance of Milošević’s political speeches. With better time-management, the trial could have been shortened considerably.<sup>12</sup>

For example, in general, the Trial Chambers wasted an inordinate amount of time requiring that the Prosecution prove time and again that an armed conflict had occurred in Bosnia. By the time of the *Milošević* trial, this resulted in our having to re-prove the basic frame of the conflict as well as the individual incidents when the core of the case was a claim about a command structure reaching to Belgrade. A period of pretrial management by a more engaged and procedurally empowered Chamber would have allowed the judges to eliminate issues that were not



contentious and to further narrow the issues for which direct oral testimony was required.\*

## **B. The Prosecution**

The judges are certainly not the only one to blame for the length of the trial. My office and I also made strategic errors, and also confronted problematic obstacles that either lengthened the trial or weakened our case. Our “*Kosovo*-first” strategy did both these things, whereas our inability to develop a more assertive strategy on adjudicated facts, better manage witnesses and lengthy accusations, or win greater rights during the examination of witnesses are examples of procedural opportunities to shorten the trial that were missed.

### **1. Decisions of sequencing**

The Trial Chamber decided that the trial would begin with the *Kosovo* case instead of following the chronological order of the events. I suspect that the Chamber was unhappy because it had lost in our appeal for joining the three cases and therefore denied our request to begin with the *Croatia* case.<sup>13</sup> The strategy we would have preferred would have been to present the evidence chronologically and show the evolution of the JCE over time and across the three conflicts, but because the Chamber had decided to start with the *Kosovo* case—the last in time—this was not possible.

### **2. Decision to begin with the crime base**

Another strategic error—this one attributable to the Prosecution, rather than the Chamber—was our decision to present evidence of the crime base first and then continue with evidence against the Accused. Instead we should have started with Milošević’s criminal responsibility, but it simply had not occurred to us.

The decision to begin with the crime base was a strategic error because it wasted time and suffused an event billed as the “trial of the century” with anticlimax. Viewers across the world—but especially people in Serbia and Kosovo—were expecting to see Milošević, the man most responsible for the destruction of Yugoslavia, face witnesses of his stature: diplomats, international negotiators, and, especially, former protégés who were prepared to testify against him. Instead, there appeared first a series



of victims, some of them barely literate peasants and working people who were utterly disoriented outside of their home villages and neighborhoods, with no idea how to respond to the browbeating Milošević served up as cross-examination. Moreover, although these first witnesses were telling the truth about the key events they had experienced, they also started changing their earlier statements in ways that were not true, in particular denying knowledge of KLA activity;<sup>\*14</sup> this disastrously damaged their credibility. Recognizing these problems, we changed our strategy, but although it was not too late in terms of the forensic trial process, the damage to public opinion had already been done.

### **3. Adjudicated facts**

Just as the Chamber should have structured the trial to remove contentious issues and allow greater reliance on the work of other trials, the Prosecution should have insisted far more robustly that adjudicated facts be admitted. In this case, the Chamber could have decided that some facts that had already been objectively proved in other trials did not have to be proved again.<sup>15</sup> I recognize that we were not particularly active in persuading the Chamber of the availability and importance of adjudicated facts, which was one of our errors as the Prosecution.

### **4. Lengthy accusations**

The three indictments—whether in their joined form or separately—contained an expansive list of counts and allegations against Milošević, which necessarily implied a long trial. A shorter indictment would have shortened the trial—though there are also costs to such streamlining.

In particular, reducing the charges could have been dangerous from the point of view of victims' perceptions. The Prosecution was of course free to request that the charges be reduced, but the judges had also created a rule that allowed them to decide if the Prosecution had to drop a point of accusation or a witness;<sup>16</sup> whatever benefits this may have had from the point of view of shortening the trial, many victims did not understand why a particular massacre was not important to the Tribunal. As the representative of the victims, the Prosecution must demand justice for all victims, not just some a selected few. Just as I felt that it was not the Prosecution's place to preempt the Chamber's adjudication of plausible

genocide charges, I found this rule an interference with the independence of the Prosecution. A trial chamber should refrain from unilaterally shrinking complex leadership cases. Judicial decisions to remove counts arbitrarily may seriously undermine cases against high-ranking individuals.

### **5. Unimportant or redundant witnesses**

Still, there were ways in which we in the Prosecution could have streamlined our own case, especially regarding witnesses. In the course of proving the crime base we interrogated a lot of witnesses to corroborate the incidents mentioned in the indictment. The difficulty arose from the broad range of charges, all of which required sufficient evidence, and the effectiveness of any given witness was often unclear until all the evidence was gathered. In the event, many witnesses testified to the same facts, using time that could have been saved with better management of how the crime base evidence was presented and a more careful selection of witnesses.

### **6. Hostile witnesses**

Part of the Prosecution strategy in developing the indictments was to find inside witnesses. We thought this would be critical to painting a picture of control from Belgrade, and although this was true, we did not fully recognize the risks accompanying inside witnesses. In the actual trial there were many hostile witnesses: Insiders often changed their stories when they took the stand and faced their old political taskmasters. A prominent example is the testimony of Radomir Marković, former head of the SDB, who upon cross-examination largely recanted his prior testimony.\* This kind of switching was difficult to manage and we did not always have enough time to prepare, but partly it was a structural problem: The Tribunal's rules bar the Prosecution from cross-examining its own insider witnesses and treating them, if necessary, as hostile witnesses.\* Obviously, this rule should be revised.

### **7. Cross-examination of victim-witnesses**

The cross-examination of victim-witnesses is a serious problem in all trials. The victim-witness is suffering in the trial and has to retell and

relieve the horrible experiences while being attacked by the defense. As Prosecutor I intervened many times, but my objections were not always granted.<sup>17</sup> Milošević was very talented in attacking witnesses: He could talk softly and in a friendly manner, and in this way sometimes achieved a substantive change in the victim's testimony. I think he did this just to show his ability, not to defend himself—but whatever his motivations, the broader lesson I drew is that rules must be established to offer special protection for victims during cross-examination.

## **C. The Accused**

Milošević's behavior in the courtroom contributed considerably to the length of the trial. The Chamber's decision to recognize his right of self-defense gave him the freedom he needed to raise an overtly political defense. Beyond that, he managed to attack witnesses and cross-examine them in a way that hampered their credibility. But perhaps the most problematic difficulty connected with the Accused was his ill health, which constantly delayed the trial and ultimately contributed to its termination.

### **1. The damage done by self-defense**

Milošević's declaration that he would defend himself personally—without a defense lawyer—was made both in writing and orally during his first appearance for the *Kosovo* indictment in July 2001,<sup>18</sup> and at the end of August the Chamber ruled for the first time that he was entitled to represent himself.<sup>19</sup> Milošević clearly knew he could not defend himself successfully in a legal sense, because he did not even bother to mount a proper defense. Instead, as several other authors show in their chapters, Milošević chose to present a political defense, to speak directly to his constituents in Serbia, to exploit each trial day—and there were only three in a week—as an opportunity for political diatribe.\* It did not have to be this way.

The Tribunal is clearly obliged to allow self-representation if an accused is ready and able to defend himself.<sup>20</sup> This right is not absolute,



however, and the Prosecution has consistently opposed each effort by an accused to defend himself, not only Milošević's. But the particular circumstances of the *Milošević* trial—including his poor health and the complexity of the case—were compelling reasons to appoint defense counsel.

Even though Milošević chose to represent himself, the particular right of self-defense the ICTY afforded—drawn from the common law—actually shielded him from the Chamber's full scrutiny. Under common law procedures that were copied in the ICTY Statute, an accused can only be interviewed as a witness if he agrees. It is possible that during a trial lasting months or even years, the accused does not ever have to directly answer questions about his actions. I consider cross-examination to be an important factor in judging an accused: The way he speaks and reacts to questions shows a lot and is of help for the evaluation. However, although Milošević certainly spoke a great deal during the trial, it always on his own terms, and always in his notional role as his own attorney.

Besides, with Milošević, it was not actually *self*-defense. What occurred was disguised as self-defense because only Milošević appeared in the courtroom, but in reality, he had a large team of lawyers working for him behind the scenes. In addition, because Milošević did not bother to argue legal points, the Tribunal appointed *Amici Curiae*, who, despite their name, primarily provided support to Milošević.<sup>21†</sup> This was a bastardization of the traditional practice that allows *Amici* to advise a court, and indeed the whole idea of self-defense as practiced at the ICTY seemed misconceived.

All of this suggests a need to revisit the right of self-defense in international trials. The ICTY Statute affords a right to self-defense—and so do other tribunals, as Anoya notes—but there is no principle in international law that requires this. Under civil law principles, someone who participated in the facts of the crime does not have the necessary distance to defend himself, and therefore must always have a lawyer. Had Milošević been tried before a court in Serbia, there would have been no question of his defending himself. Although the statutory nature of the right at the ICTY is unavoidable, the Chamber has had many problems with self-defense, and is now less doctrinaire in applying the rule, as its conduct in *Šešelj* and *Karadžić* suggests.<sup>‡</sup>



## **2. A political defense is not a defense**

Milošević's self-defense was even more problematic because Milošević defended himself in an exclusively political manner. In the written submissions, his lawyers defended him on legal issues. But orally, he only advanced a political defense. He did not recognize the Tribunal as an authority competent to judge him. So when he spoke, he did not speak to the "false tribunal," as he called it,<sup>22</sup> but to the Serbs.

Milošević's defense consumed inordinate amounts of courtroom time, not only because it enabled him to present a stream of irrelevant political and historical questions and arguments, but also because we, from the Prosecution side, found ourselves without any interlocutor: There was no objective counsel with whom to stipulate undisputed facts or sort out technical questions. This left it to the trial judges to handle mundane issues, including the minutiae of Milošević's treatment in the detention unit, in open court rather than outside.

At one level, this was Milošević's own strategic choice, and he took the risks of that choice. However, in important ways, his choice damaged the trial as a process and even vitiated his right to a fair trial. Because Milošević was not defending himself against the facts, in a sense he was not provided with a fair defense.<sup>23</sup> Until almost the end of the *Bosnia* phase he had not presented any evidence in his defense—because he did not want to legitimate the Tribunal, and because his aim was entirely different. If he had had a lawyer to defend him, his defense would have been based on the facts and not on political issues.

If the Trial Chamber had shown resolve in this regard from the beginning and imposed defense counsel (as they eventually did, but only at the beginning of the defense phase two year later<sup>\*</sup>), Milošević would have had to concede, though he surely would have resorted to some fallback strategy to politicize the trial. In my opinion, the judges' concerns over a fair trial were exaggerated and created a situation that was unfair to everyone—including Milošević, however much he may have preferred it. The judges' lack of resolve was a weakness Milošević exploited from the start and throughout the whole trial.

## **3. Attacks on witnesses—how Milošević managed the trial**

Milošević's aim was to destroy the credibility of witnesses, not to defend himself. During cross-examinations, Milošević got the chance to attack witnesses in many ways, particularly victim-witnesses; they often felt inferior when they stood before their former president, and he took advantage of their weakness. Milošević was very clever in approaching the witnesses: sometimes he acted very carefully—almost softly—but playing with his authority, with the aim of making the witness change his statement.<sup>†</sup> Other times he attacked the witnesses aggressively, depending on the person and how much he knew about them—and he often knew a lot. Sometimes Milošević succeeded in getting Prosecution witnesses to in effect testify for and not against him; he was very talented in cross-examination, though of course he also had—behind doors—that team of lawyers working for him. I must say that from a professional point of view, I admired his interrogation technique: The way he made witnesses change their statements was fascinating to watch.<sup>‡</sup> Of course we did everything we could to ensure that our witnesses would not be intimidated, but the Chamber did not always support us.<sup>24</sup> Many of the witnesses were also afraid of the power Milošević still wielded, and witnesses were legitimately concerned that they might face repercussions for their testimony.

#### **4. Milošević's health**

Milošević's poor health was a decisive factor in delaying completion of the trial, and also gave him a strategic advantage in controlling the schedule of hearings. Milošević suffered from high blood pressure, and whenever he did not feel well, proceedings would be interrupted, his blood pressure would be measured, and the trial would continue only if he were declared fit enough. This had real effects on the flow of the trial: we could only work half a day three times a week because of his medical condition. The Court found itself placing new limits upon the Prosecution's ability to present its case. Milošević's high blood pressure would sometimes prompt the Trial Chamber to ease the burden upon him by limiting the numbers of hours of testimony each week and often by recessing the trial for days at a time.

Nor was this an entirely natural process. Milošević was obliged to take pills against high blood pressure, but he disregarded the advice of his

doctors and tampered with his medicines, apparently by receiving special, unauthorized doses of rifampicin during privileged visits, despite attempts to monitor and control his medicines.<sup>\*</sup> These drugs reduced the effect of his blood pressure medicine, which drove up his blood pressure and on occasion prompted his doctors to advise the judges that he would be temporarily unable to withstand the rigors of the open court. In effect this allowed him to conduct the trial as he liked, and indeed, the Prosecution team had the sense that Milošević's blood pressure seemed to rise just before the appearance of witnesses who had the potential to be especially damaging.<sup>25</sup> Whatever the precise contours of his illness, it unquestionably prolonged the trial; instead of four years, it could have been finished in one, if we could have worked five days a week.

### **III. Conclusion: The Cause of Death**

The official report says that Milošević died a natural death.<sup>26</sup> But of course, in such a case there remains always an open question. As he was taking different medications, one explanation is that, as discussed above, he knowingly altered prescriptions and dosages and this contributed to his death.<sup>27</sup> Shortly before his death he had requested provisional release for medical care in Russia, but this request was denied, and it was around this time that he likely stopped taking the drugs that had counteracted his medicine.<sup>28</sup> Milošević had dedicated medical staff to take care of him at all times<sup>29</sup> and he had significant opportunities for free contact with the outside world;<sup>30</sup> all this leaves room for many speculations about the cause of his death.

But whatever the cause of Milošević's own demise, the real question that should concern us is the condition his trial was in before that biological event's contingent intervention. In spite of a correct indictment, under the circumstances that prevailed the conduct of a fair and expeditious trial was put at risk. Milošević's self-representation did not comply with the criteria of a fair defense or a proper trial, whereas the time-consuming procedure and the dreary, sometimes unnecessary presentation of evidence and the Chamber's failure to take control of events prolonged the trial in such a way that one is tempted to say:

Milošević's death, after more than four years, put the trial out of its misery.



## Outside the Internal Dynamics of the Prosecution

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*Professionals working inside international courts have a tendency to operate in a bubble, so focused on the tasks at hand and the enormous weight of their mandates that they are seemingly oblivious to outside activities. But although the Prosecution naturally played the central part in addressing the challenges of investigation, indictment, and trial, outside actors played a role in the preparatory work done for Milošević. This chapter considers perceptions of the Milošević trial outside the internal workings of the Prosecution, and provides a limited critique of the Prosecutor during the trial.*

Carla Del Ponte provides a fascinating insider's view of the dynamics at work within the Office of the Prosecution before and during the *Milošević* trial. Without question, each of the chief prosecutors of the ICTY has left a unique and indelible mark on the Tribunal, and Del Ponte, by far the longest-serving, made some of the most groundbreaking decisions.<sup>†</sup> It was during her tenure that many of the highest level accused went on trial, and when most of the arrests and transfers to the Tribunal were secured. Although the Prosecution's initial investigation of Milošević and the *Kosovo* indictment (which Williamson discusses in his chapter) preceded her tenure, the *Bosnia* and *Croatia* indictments and the whole trial took

place under her supervision. As a consequence, Del Ponte's view from inside and opinions are of great historical interest.

The subtitle of her chapter—"Indictment Correct, Trial Impossible"—is indicative of what's to come: her conclusion that the Prosecution put forward the best possible indictment, but issues outside her office's control—unmanageable rules of procedure and evidence, poor decisions by the Chamber, and Milošević's ill health—resulted in a process unfair to all. Indeed, Del Ponte insists that allowing Milošević broad leverage to represent himself, and to put on a political rather than strictly legal defense, resulted in a trial that was unfair even to him, however much he preferred it.

At times reading Del Ponte's informative chapter, one simply cannot help but wonder: "What if?" What if the Chief Prosecutor had not put in place the necessary ingredients to ensure that, in the unlikely event Milošević—who was still president of the FRY—was arrested and transferred to the ICTY for trial, the evidence in the Prosecution's possession would be strong enough to prove the sweeping charges against him? What if the indictments had never been joined and Milošević had been tried, and perhaps convicted, on the *Kosovo* charges alone prior to his death? Would there have been a subsequent trial on the other charges? Would the victimized community have gained more satisfaction? What if Del Ponte had not been convinced that the Prosecution would eventually gain access to Belgrade and would find evidence that Milošević had materially supported Mladić and Karadžić in the genocide at Srebrenica? Would genocide have been omitted from the *Bosnia* indictment, and if so, what would the repercussions of that have been?

These are speculative questions, but if anyone is well-positioned to consider them, it is Del Ponte, as they arise from the choices and the challenges she confronted throughout the years of preparation and trial. Del Ponte catalogues a range of difficulties faced by her office in investigating serious and complex allegations of genocide, crimes against humanity, and war crimes. The task involved balancing diplomacy with highly sensitive work, including recruiting insider witnesses, excavating graves, and collecting critical linkage evidence. The atrocity sites in Bosnia, Croatia, and Kosovo presented logistical and organizational challenges of their own, but much of this work needed to be done in Serbia proper, and initially her prosecution and investigation teams could not

enter that country and did not have access to its archives; requests for cooperation fell upon deaf ears. Her chapter therefore illuminates the importance of international prosecutors being able to have discretion to use both carrots and sticks in performing their mandates, tools common in many domestic jurisdictions. For instance, Del Ponte highlights the value of plea agreements—and implicitly of the threat of lengthy prison sentences—in leveraging testimony from insider witnesses such as Babić.\*

But although some of these tools were wielded or even crafted by the Prosecution, not all of them were; outside actors played a role in the successes Del Ponte ascribes to the preparatory work done for *Milošević*. Professionals working inside international courts have a tendency to operate in a bubble, so focused on the tasks at hand and the enormous weight of their mandates that they are seemingly oblivious to outside activities. Perhaps for this reason, Del Ponte's account does not give sufficient credit to external experts and professionals when she laments that "[o]utside the Office of the Prosecutor few knew or understood the challenges that arose during the preparations of the *Milošević* trial[.]"<sup>1</sup> Although outsiders indeed should not be privy to the Prosecution's confidential internal decision-making processes, there were nonetheless sophisticated international justice and human rights lawyers and political officers working parallel to the Prosecution's efforts who did understand the complexities involved and who worked behind the scenes and in foreign capitals to facilitate the efforts of the Tribunal. Many were working on securing accountability for the highest-level perpetrators well before Del Ponte entered the scene; these share some credit for Milošević's ultimate downfall, arrest, and transfer, and many then worked on outreach, communications, and political messaging in the region before and during the trial.\* Likewise, Del Ponte's success in securing cooperation from Serbia was at least as much a function of states' diplomatic pressure and leverage on Belgrade as it was the Prosecution's own efforts.

Within the institutional confines of the ICTY, by contrast, Del Ponte was at times arguably too attentive to the role of others. She writes that she felt "duty-bound" to include a genocide charge in the *Bosnia* indictment once a *prima facie* case was made, as it was the judges' responsibility to determine if genocide has indeed been committed. This begs the question: Should a prosecutor throw in all possible charges and

let the judges sort them out, or is it a prosecutor's job to bring tight indictments that take into account the broader contextual issues—length of trial, impact on victim-witnesses, and financial outlays? In part, Del Ponte's view arises out of her Swiss civil law training and perspective—a particularly consequential example of a recurrent dilemma that has never been fully satisfied by a tribunal that incorporates competing processes and aims from both the civil and common law systems.

Yet however deferential she may have felt toward the judges when it came to deciding about genocide, Del Ponte still lays many of the problems in the *Milošević* trial at their feet. This is unsurprising, of course—after all, if at the time she had considered those problems to be the Prosecution's fault, she could have fixed them and sped up the trial. Del Ponte complains that the Tribunal needs more experienced trial judges, and judges steeped in international criminal law procedure, yet Richard May was an experienced criminal trial judge from Britain who had already served at the ICTY for six years by the time he began presiding over the *Milošević* trial. His successor, Patrick Robinson, had likewise served as a judge at the Tribunal for six years by the time he replaced May. Del Ponte may not like their decisions, but both were steeped in international criminal law practice and procedure by the time they presided over the *Milošević* trial.<sup>†</sup>

Implicitly, however—and even more than experience—Del Ponte suggests it was the judges' lack of will to use their inherent powers to improve the process, particularly regarding self-representation, that was at the root of the trial's problems. The Trial Chamber was overly solicitous of Milošević, at the expense of the victims, something Del Ponte bitterly complains about and that is commonly heard in the former Yugoslavia as well. The judges should have intervened far more often to halt Milošević's disruptive antics and prevent him from using the courtroom as a political stage. Often, he was not defending himself, but simply posturing and bullying. Yet because he was representing himself in the courtroom, Milošević was given unusually broad scope to pursue his own strategy, which resulted in his intimidating and demoralizing witnesses—even while he had, according to Del Ponte, some 40 lawyers working for him outside the courtroom, though Anoya implies the number working in The Hague, at least, was much lower.\*



Continuing her critique of the Chamber, Del Ponte lays considerable weight on the common-law proclivities of the ICTY—something partly attributable to the judges, because they wrote and have continually amended the RPE<sup>†</sup>—as a key contributing factor both in the *Milošević* trial’s length and in the overly broad license Milošević secured for himself to hijack the proceedings. Yet it is not clear that the common law is really to blame here—or at least it is not clear that the civil law (with which Del Ponte is more comfortable) is likely to do any better. In the Extraordinary Chambers in the Courts of Cambodia (ECCC), the *Duch* trial against a former Khmer Rouge torturer used a thoroughly civil law system—with investigating judges and civil law rules—and yet lasted nearly a year, even though the single mid-level accused had pleaded guilty to war crimes and crimes against humanity;<sup>‡</sup> the next ECCC trial, against four senior leaders of the Khmer Rouge, is expected to last at least three years. As Del Ponte rightly insists, no trial should last for four years—but the Prosecution and Chambers, as well as Registry,<sup>§</sup> share responsibility for extraordinarily lengthy trials.

Indeed, the single most important contributor to the length of the trial was, in a sense, a joint error by the Prosecution and Chambers. It was the Prosecution that requested that all three cases be joined into a single trial, a request ultimately upheld by the Appeals Chamber. As Boas notes, this produced a huge and unwieldy trial, and it could have been otherwise: Had Milošević faced a first trial just on the *Kosovo* charges, that could have been relatively quick and easy, and considering the evidence actually given in the trial, most likely would have resulted in a conviction at least on some charges.<sup>2</sup> But because all three cases were joined, judgment could be rendered only after the full trial, and the victims of Milošević’s crimes were denied justice when he died before his lengthy four-year trial ended. Despite health concerns during his trial, his death was not predicted, but the length of the trial, once it included all three indictments, could have been anticipated. It is true that the Appeals Chamber ordered the joinder, but it was the Prosecution that requested it and filed an appeal when the Trial Chamber initially denied joinder for *Kosovo*. It is therefore notable that Del Ponte all but ignores joinder’s effect on the length of the trial\*—for her, its negative impact was on the sequencing, not the length.

The Prosecutor gamely admits, however, that her office made a few strategic errors in the case. In her typical no-nonsense style, she laments that, in the early days of the trial, instead of showing viewers evidence of Milošević's own responsibility, her team put on crime-base witnesses first—"a series of victims, some of them barely literate peasants and working people who were utterly disoriented." As a technical description, this was sometimes accurate—a number of other chapters describe much the same thing.<sup>†</sup> Still, this is cringe-inducing stuff, and telling about how the victims' own self-described representative perceived them. Yet one might see these same witnesses as powerful and compelling precisely because of the power dynamics and literary discrepancies in the courtroom, and the leeway the judges allowed to the Accused: What courage these survivors had to go into an intimidating and foreign courtroom in a strange country and face this powerful leader who had ruined their lives. The situation also echoed the earliest trials before the Tribunal, when savvy and sophisticated prosecutors plowed over defense attorneys who did not have expertise in international law or familiarity with common law adversarial trial norms.

Still, it is unclear just how much of Milošević's dominance of the courtroom or continued popularity among Serbs had to do with rustic witnesses or even with the Prosecution's self-described strategic error of leading with victims rather than with evidence of Milošević's own responsibility. Although it is possible that it would have been better to lead with linkage evidence demonstrating Milošević's guilt, it is hard to believe that Milošević would not still have grandstanded and manipulated the process. Here too, of course, the trial has had a real impact on the institution: As Anoya discusses, the failure of the *Milošević* bench to adequately control its Accused inside the courtroom helped lead to better rules governing self-represented accused and to more assertive practices in some chambers<sup>‡</sup> of the very kind Del Ponte implicitly wanted the *Milošević* Chamber to apply.

Del Ponte's fascinating account of hostile witnesses has important implications for other tribunals in similar situations. The difficulty in knowing what hostile witnesses will say at the ICTY is being replicated at the ICC, where the same issues also arise in discussions about cross-examining victim-witnesses. It is instructive that the main lesson Del Ponte draws from this practice after so many years at the ICTY is that

“rules must be established to offer special protection for victims during cross-examination[.]”<sup>3</sup> The ICC practices are directly contrary to this lesson, and one trial chamber has already forbidden prosecutors and defense attorneys from proofing witnesses.<sup>4</sup>

The most compelling reading in Del Ponte’s chapter is the section discussing Milošević’s decision to represent himself, “to present a political defense, to speak directly to his constituents in Serbia, to exploit each trial day ... as an opportunity for political diatribe. It did not[,]” she concludes, “have to be this way.”<sup>5</sup> She implies that the ICTY handed Milošević a soapbox upon which to continue his hate-mongering. This is a common enough critique of the trial and the judges’ management of it—several of the other authors make the same point, including Boas—but Del Ponte goes further, arguing that in affording him such wide latitude to present a political instead of legal defense, the judges allowed Milošević to “vitiate[] his right to a fair trial.”<sup>6</sup>

This is a tremendously far-reaching claim, because the primary underpinnings of the ICTY’s legitimacy is the right to a fair trial, and if the Tribunal violated this right by bending over backward to accommodate Milošević, that will taint the entire institution. Clearly, the judges had to strike a difficult balance between defense rights and victims’ rights, and had to know where to draw the line between affording the self-representing accused sufficient latitude to defend himself and limiting that leeway to ensure that he was actually advancing a meaningful legal defense.

Milošević was unquestionably a dominant presence in the courtroom, and as Del Ponte notes, his skilful cross-examination techniques ranged from soft to aggressive, depending on his opponent and the particular aspect of the testimony he was trying to get the witness to undermine, retract, or equivocate on. He was a master manipulator and highly accomplished politician, and, as noted above, many observers found it heart-wrenching to watch a still powerful and popular former leader rip intimidated survivors to shreds. Aside from having a former president essentially interrogate his former constituents-cum-victims—instead of, for example, the Trial Chamber appointing an interlocutor to ask the questions Milošević wanted to pose—there was a chilling factor present in the courtroom: Milošević continued to wield a great deal of power back in



the region, and as Del Ponte points out, witnesses were “legitimately concerned that they might face repercussions for their testimony.”<sup>7</sup>

The Prosecutor also highlights what she saw as the utter ineffectiveness of the *Amici Curiae*—whose appointment she thinks resulted in “a bastardization”<sup>8\*</sup> of legitimate *Amici* processes—not only because Milošević wasted enormous amounts of courtroom time on issues irrelevant to presenting a defense, but also because the Prosecution had no effective interlocutor to stipulate undisputed facts or handle common technical issues, thus requiring the trial judge to handle, in open court, such mundane issues as the minutiae of Milošević’s treatment in the detention unit. Even when the *Amici* were appointed as actual defense counsel, Milošević’s largely successful resistance to their participation meant that they still could not effectively serve these functions.

Finally, in addition to a politicized defense, intimidation of witnesses, and marginalization of actors who normally populate the interactive trial process, Milošević exercised one further and decisive influence over the proceedings: Del Ponte emphasizes that Milošević’s illness—but also his covert use of drugs to manipulate the effects of his blood pressure medication, allowing him to control the speed of his trial—was an element out of her control. This is, in some sense, undeniable—and was in part a function of what she sees as the judges’ deference to Milošević, as they approved the regime put in place by the Registry that allowed him with relatively little oversight to receive visitors.

Yet the conclusion she draws—the “what if” she herself introduces—is surprising: Del Ponte suggests that “instead of four years, [the trial] could have been finished in one, if we could have worked five days a week.”<sup>9</sup> If such a claim is indeed true—and it is by no means clear it is—then tens of millions, perhaps over a hundred million dollars, were wasted by not better controlling this one defendant’s ability to manipulate his medication. Still, if the Prosecution truly believed it was possible to hold this complex genocide and crimes against humanity trial within a year, that could explain its insistence—her insistence—on going to trial for all three indictments instead of for *Kosovo* alone.

Whatever the effects of Milošević’s illness, based on experience in comparable trials involving complex cases and evolving circumstances, we should be skeptical about the claim that the *Milošević* trial could have



been conducted in a year. Indeed, the *Milošević* trial was frequently prolonged to allow the Prosecution to go to Belgrade to obtain new evidence and interview new witnesses as they became available in the changing political climate. Other evidence was discovered after Milošević died. What would the impact have been if the Mladić diaries had been available during trial? Who knew during the Prosecution phase that the *Škorpioni* video existed? No doubt, other inculpatory and exculpatory evidence will come to light as well.

Theoretically, yes, even complex atrocity trials should not last for several years, and we may hope that soon war crimes tribunals will be able to conduct complex trials in shorter times. But in fact, so far, other leadership trials have not been quick either: For example, former Liberian president Charles Taylor went on trial before the Special Court for Sierra Leone in January 2008, and the trial did not end until March 2011, with judgment in 2012, despite having no genocide charges, no health delays, and no self-representation issues. And, as we have already seen, trials turn out to be painfully long whether one adopts a civil, common, or hybrid procedure.

Del Ponte's concludes her observations by returning to her subtitle: The indictment was correct but the trial process was impossible. Whether or not one agrees with her assessment of the indictment or the trial, it is difficult not to respect her passion, her frustration with the process, and her commitment to try to provide a measure of justice to the victims.

It is not yet clear what the particular legacy of Del Ponte's approach to *Milošević* will be. In her chapter, Hartmann expresses strong doubts that the post-Del Ponte Prosecution has preserved a coherent theory and body of evidence in related trials of the Belgrade leadership. That may or may not be, but another part of Del Ponte's, and the Tribunal's, legacy is institutional and strategic. The *Milošević* trial demonstrated the opportunities and dangers of self-representation, for example, and chambers are now more assertive in policing self-representing accused.\* Other aspects of that legacy are still in flux: After Karadžić's arrest, there were calls to reduce the scope of charges—a clear response to the sprawl of *Milošević*—but also countervailing demands to preserve a broad array of charges in order to tell the most comprehensive story and validate the experience of victims. Perhaps we will know we have learned the lessons of the *Milošević* trial when we see the indictment for a trial such as

*Karadžić* or *Mladić* severed, with the Chamber proceeding to judgment solely on a discreet set of charges—in those cases, say, just the Srebrenica charges—and only later resume trial on the other charges.\* Just such an approach—at least one judgment on limited charges against Milošević—would have provided more justice than the all-and-then-nothing approach that, as it turned out, Del Ponte’s prosecutors pursued, Milošević exploited, and the Chamber allowed. Still, as Nielsen points out in this volume and others point out elsewhere, there are many lessons to be learned from the *Milošević* trial, despite its failures and grossly unsatisfactory ending.<sup>10</sup>

## In the Shadow of Nonrecognition

*Milošević and the Self-Represented Accused's Right to Justice*

EVELYN ANOYA

*Special Tribunal for Lebanon\**

*When Milošević was transferred to the ICTY, it was not yet known if he would represent himself. His decision to do so forced the ICTY to reconsider and revise its procedures and assumptions for how to conduct a fair and expeditious trial. This chapter reviews the growing challenge faced by the judicial administration of international courts in dealing with defendants who invoke a right to self-representation—a challenge that, in Milošević, was both procedural and interpersonal—and assesses the extent to which these institutions are responsible for ensuring that defendants have adequate means to put their case. The Milošević trial highlights the pioneering work of the Tribunal in addressing these challenges, the lessons the Tribunal learned, about creating a process and an atmosphere of consent and cooperation and the reforms it employed in better supporting self-representation in later complex cases, such as the Karadžić trial.*

### I. The Challenge of Self-Representation

Whether at the international or municipal level, a judicial system that is designed to try alleged criminals is obliged to ensure that the principles of justice do not vary and are guaranteed at each phase of the process. The consequence of failing to ensure a uniform fair process is a fragmented bond between the spirit of the law and its just application. More practically, a defective process delegitimizes the value of judgment, thus weakening the relationship between a court and the people it hopes will benefit, for example in the context of reconciliation.

One of the mechanisms by which an adversarial legal system ensures consistent and fair process is through the use of professional representatives: Prosecutors are trained lawyers, but most defendants are not, so allowing them to be represented by defense counsel helps to ensure equality of arms. But when a defendant chooses to represent himself, this institutional balancing—and the assumptions that surround it—is thrown into doubt.

To be sure, a self-representing defendant sacrifices a great deal—expertise, perspective, emotional distance—and places a far greater burden on his own abilities; he risks becoming the proverbial “fool for a client.” Arguably there are few incentives to waive one’s right to representation. Still, self-representation has a long history in certain legal traditions, and its own assumptions surrounding it:

A certain unreconstructed mystique has unfortunately shielded the right of self-representation over the years. The iconic image it presents is one of a simple citizen, typically a social outcast or a proud political dissident, pleading for simple justice before a jury of his peers. It is a portrait of direct democracy at work, a self-represented individual throwing off the formal trappings of the state and its lawyers to present an unmediated narrative voice in the courtroom. It heralds the simple force of truth against the overly rationalized power of the state, the freedom to say “no” to both the power and the process of the prosecution. It champions a nostalgic sense of the simple liberties due the common man even in an age of highly regulated complexity.<sup>1</sup>

Wisely or not, individuals do choose to defend themselves, and once a person’s right to represent himself is upheld by the law, a number of issues arise: What responsibility does the judicial institution have to ensure he is given adequate facilities to allow him to put his case? Are the standards applicable before state courts relevant at international and hybrid criminal tribunals? These issues may seem technical, but they go to the very core claims about legitimacy and efficiency on which a juridical process rests:



At minimum, a judicial institution, whether municipal or international, must ensure that the notion of fairness and access to justice are upheld.

The international justice system is designed to handle complex crimes on a theoretical level, but when faced with practical challenges such as trying an accused who waives his right to representation, the system exhibits its weaknesses. How should an international tribunal administer the case of a self-represented accused?<sup>2</sup> Does it have an obligation to modify its rules and procedures to serve the needs of an unrepresented accused, especially one who is detained and whose access to people and information is therefore restricted? These were the kinds of questions that arose when Milošević became the first defendant at the ICTY to defend himself—and, moreover, one who did so while denying the legitimacy of the Tribunal and refusing to engage it directly.

This chapter does not address the wider debate surrounding the right to self-representation<sup>\*</sup> and its status in customary international law.<sup>†</sup> Whatever the wisdom or legal status of self-representation more generally, the ICTY Statute clearly provides for such a right,<sup>\*</sup> as does the Rome Statute and those for other tribunals;<sup>3</sup> the opportunities and problems implicit in applying such a right will therefore continue to arise. The aim of this chapter is to review the growing challenge faced by the judicial administration of international courts in dealing with defendants who invoke their right to self-representation, and to assess the extent to which these institutions are responsible for ensuring that defendants have adequate facilities to put their case.<sup>4</sup> Through the ICTY's institutional efforts simultaneously to accommodate that claim of right, and yet also to engage him in the trial process, Milošević ultimately became an active if indirect participant in the process of judicial administration. The *Milošević* trial highlights the pioneering work of the Tribunal in addressing these challenges, the lessons it learned, and the reforms it employed in better supporting self-representation in later complex cases, such as *Karadžić*.

## **II. Self-Representation and the Rules of Procedure and Evidence**

*Although the [Statute] provided the defendant with the right to self-representation, no mechanisms were in place to allow that to happen in practice.*<sup>5</sup>

When Milošević was transferred to the ICTY in June 2001, it was not yet known that he would represent himself, and consequently the Registry followed its standard admission process.<sup>6</sup> Milošević had legal representation before the Belgrade District Court, the Dutch Court, and also the European Court of Human Rights;<sup>7</sup> however, he refused to appoint counsel before the ICTY because he argued, as he would also later, that he did not recognize its legality<sup>8</sup>—implicitly invoking the same argument used against the Nuremberg Tribunal, namely that the ICTY represented victor's justice.<sup>9</sup> Whatever the merits of that view, Milošević's decision to refuse counsel—which ultimately led to what the Introduction refers to as the self-representation crisis of *Milošević*—raised an immediate problem: What did it mean to represent oneself at the ICTY?

The ICTY Statute establishes a right to self-representation, but is largely silent about what that right means in practice; the RPE, meanwhile, make no mention of self-representation.<sup>10</sup> There was thus a considerable silence—and a gap between the two documents—and so the judges were required to reach beyond the black letter law to address the practical and conceptual challenges that the rules' application brought to light.<sup>11</sup>

The RPE are an amalgamation, primarily drawing on adversarial systems, but with some variations borrowed from the civil, inquisitorial system: a hybrid model.<sup>12</sup> As a result, the particular solutions to problems that have arisen in cases—as interpretation and revision of the RPE has also been guided by or in response to precedent<sup>13</sup>—inevitably are marked by laws and procedures from municipal legal systems represented by the mixture of individuals employed at the Tribunal. This accretional codification of the rules has often been favorable to a more efficient and effective judicial process.

Thus although the ICTY had never confronted the question of a self-representing defendant, there were sources and points of reference for the Tribunal to draw upon, much as it did for other aspects of its jurisprudence. In the last 20 years, there has been a dramatic increase in cases of self-representation worldwide, and municipal jurisdictions have

been compelled to devise better methods to address this emerging trend.<sup>14</sup> After many reports, committees, and commissions,<sup>15</sup> state courts began to liberalize and amend their practices, eventually producing “marked improvements in the service provided by courts and ... mak[ing] the courts process both more understandable to and more acceptable by self-represented litigants.”<sup>16</sup> Today, court administrators argue that if any court “lack[s] assistance to self-represented [litigants it] should develop some level of assistance as soon as possible.”<sup>17</sup> Obviously, fairness concerns militate against designing an entirely separate set of rules to support self-represented accused, an observation that has resulted in pressure to streamline juridical processes. For example, the Canadian Bar Association, in a 1996 Report,<sup>18</sup> encouraged reform to enhance access to justice by addressing the complexity of the language used in court forms and procedures; the recommendations in the Report recognized this to be a hurdle faced by the self-represented.

The results of these reforms in handling self-represented accused cases, which applied at the state level, did not transfer completely to the international level, however. When Milošević announced that he was going to represent himself, becoming the first defendant at the ICTY to do so, the Chamber and Registry cautiously followed suit by developing new internal practices to manage self-represented accused cases, which we will examine in the next section.

But even as the various institutions of the ICTY began to formulate new practices, it became clear to the Chamber that the provisions in the ICTY’s own Statute were potentially dangerous to the effective administration of the institution. Indeed, the RPE were never amended to reflect the changes made, perhaps due to the inevitable fear that more accused would repeat the unwelcome practice, thus setting a dangerous precedent. Whatever the reasons that civil litigants were increasingly choosing to represent themselves before municipal courts, the structure and incentives in complex international criminal cases may well be entirely different. The ICTY’s institutional actors are not in favor of self-represented accused, as their cases have proved to be a burden on the system; however, they have been forced to accommodate the right, because the Appeals Chamber continues to uphold self-representation.<sup>19</sup>



### III. The Initial Response—Establishing the *Pro Se* Office

*The Registry did an excellent job in creating innovative mechanisms to allow Milošević to prepare his case and communicate with witnesses while he was in detention.*<sup>20</sup>

It might have been possible to simply overrule Milošević and impose counsel—as was ultimately done several years later. From the first status conference held in August 2001, the Prosecution argued that Trial Chamber should impose defense counsel, in addition to the *Amici Curiae* who were assigned.<sup>21</sup> In November 2002, the Prosecution made a formal submission requesting that the Chamber appoint counsel because of Milošević’s disruptive behavior and recurring illness. At that early stage, the Prosecution proposed appointing the *Amici* as assigned counsel.<sup>22</sup> But the Chamber quickly decided that imposing counsel on an accused who does not want any would infringe on his right to put his own case.<sup>23</sup>

As the Chamber recognized that there was no easy way to ignore a right enshrined in the Statute, and given the unarticulated contours of self-representation in the RPE and the Tribunal’s practice, what processes should the ICTY adopt? Judge May, presiding over the Pre-Trial Chamber and later the Trial Chamber, was faced with the challenge of respecting Milošević’s right but at the same time ensuring that a fair and expeditious trial was achieved.<sup>24</sup> This was a continuing concern: the question often posed by Judge May in between court hearings—while waiting for trial to resume—was “how do we ensure defense witnesses appear before the bench to give their evidence?” or “how do we ensure exhibits are tendered or witnesses come to court?” These questions all go toward the heart of managing a case with a self-represented defendant. They were genuine concerns expressed by a highly experienced judge and shared by others at the ICTY, especially within the Registry.

One option available was to apply the lessons learned from the national systems, in particular those outlined in the Canadian Task Force Reports, by simplifying procedures and using plain language when amending the Rules. This would allow for not only an accused who was not legally trained to participate, but also a counsel who might not be



familiar with the particularities of the ICTY's hybrid structure.\* But such a procedure was not adopted as it would not necessarily address the complexity of trials such as those before the Tribunal, which require experienced and vigilant lawyers to represent accused.<sup>25</sup>

Another option was to maintain the existing procedural system, with all its complexity, but establish an institutional presence that would provide support to a self-representing defendant by acting as a conduit between him and the judges, Prosecution, and the *Amici*, who later became the Court Assigned Counsel.<sup>26</sup> This was the option eventually adopted, leading to the pioneering establishment of the ICTY'S Registry *Pro Se* Office. The *Pro Se* Office was initially set up during the *Milošević* trial's defense phase, on an ad hoc basis; and I was appointed to serve in it as liaison to Milošević, but it was only in September 2008 that the office was formalized to assist four additional defendants who chose to self-represent.\* But its work during the *Milošević* trial, including its application of lessons learned from state systems and its creation of a “go-between” the accused and the court, established the contours of the self-representation system now in use by the Registry.

Before the latter option was fully embraced, however, a third was adopted.<sup>27</sup> In August 2001, Judge May ordered the designation of *Amici Curiae*, noting that “the accused has informed the Registrar of the International Tribunal in writing that he has no intention of engaging a lawyer to represent him.”<sup>28</sup> The *Amici* were of course formally there to assist the Chamber, but the intention that they serve as a kind of shadow defense counsel was inescapable. Still, this was not a clearly satisfactory approach. Not only had Milošević rejected representation—making it awkward to be seen to be imposing counsel by the backdoor—it was not clear that the Chamber itself was sure how the *Amici* could serve in that role. Although the Tribunal had experience with appointing *amici*,<sup>29</sup> it had never done so as a way of managing a self-represented accused case nor, as we have seen, did it have the requisite procedures in place.<sup>30</sup>

These were concerns that the newly appointed *Amici* themselves pressed on the Chamber, requesting that Milošević be provided with adequate facilities to enable him to prepare for his case;<sup>31</sup> with the filing of their initial brief in March 2002, the Chamber became engaged in questions relating to the facilities that should be provided to the Accused.

The *Amici* requested that the Chamber direct the Registry to establish a more flexible regime than was already in place for defendants who were represented by counsel. They suggested Milošević be allowed to: (1) appoint a lawyer who could assist him as an adviser and be paid by the Tribunal; (2) consult with his appointed adviser; (3) have access to photocopying facilities; (4) receive and forward documents to his adviser; (5) review video evidence; (6) access computer facilities; and (7) be assisted by his advisor to liaise with the Prosecutor in relation to disclosure of exculpatory information.<sup>32</sup>

Later in March, the Registry also submitted a report on facilities being provided to Milošević<sup>33</sup>—a report that demonstrated the absence of a well-developed, preexisting system for dealing with self-represented accused. Milošević had requested to communicate “with a number of persons who could possibly provide him with legal advice regarding his detention and indictment at the Tribunal ... and legal interests in the Federal Republic of Yugoslavia.”<sup>34</sup> The Registry applied its standard policy without any exceptions: He was allowed to meet with a maximum of five attorneys or law professors,<sup>35</sup> and the meetings were not privileged.<sup>36</sup> The standard practice was that only once an accused had selected an advisor and informed the Registry would the meeting be considered a privileged communication with the legal representative. The Registry initially misadvised the Chamber that Milošević’s request to receive legal visits from Ramsey Clark and John Livingston meant that he wanted these two individuals to be his advisors.<sup>37</sup> In November 2001, the Trial Chamber issued an Order acknowledging the two individuals as the persons with whom the accused was allowed to communicate on a privileged basis. Later, in April 2002, two Serbian attorneys, Zdenko Tomanović and Dragoslav Ognjanović, were formally appointed as Legal Associates to Milošević, joined by a third, Prof. Branko Rakić, in October 2003.<sup>38</sup>

As he did not recognize the Tribunal, Milošević resisted receiving filings and refused to make written submissions to the Chamber. However, during the Prosecution phase, when Milošević rejected a position, he would make oral submissions at the next opportunity he had to face the Chamber. In addition to the filings and transcripts served to him, the Prosecution also regularly disclosed exculpatory material, which he would

read. He reviewed the witnesses' statements, and duplicate disclosure packages would be provided by the Prosecution case manager on repeated occasions, in order to ensure Milošević had the necessary documents to prepare his cross-examination. The volume of documents was massive, and often he would complain about not having space at the United Nations Detention Unit, or UNDU, to review and organize them.<sup>39</sup>

Initially, Milošević refused to receive documents from the Registry. The UNDU kept the filings he rejected boxed in a separate cell for many months until Milošević's Legal Associates were appointed. Once the Associates were assigned, they requested the Registry to transfer the boxes in the UNDU to their office and also to begin copying all filings and transcripts to them. It was a rocky beginning, but eventually we fell into a routine: Milošević would select what he wanted to read and what he would ask his Legal Associates to review. The early operations were chaotic to say the least, but eventually the Legal Associates appeared to have cultivated a system, as information began to be communicated more efficiently and smoothly. The relations with Milošević were becoming more familiar and comfortable, which proved to be essential for the next chapter of the case: the defense phase.

## **IV. Self-Representation and the Role of the Registry during the Defense Phase**

During the prosecution phase, Milošević, as his own attorney, had had an active but circumscribed role—cross-examining Prosecution witnesses, raising objections and the like, but in response to the other side's case. Now, as the prosecution phase drew to a close, the Chamber confronted the looming question of how to manage a self-represented defendant presenting his own case. It became evident at an early stage of the *Milošević* defense phase that it would be managed differently than the prosecution phase.

In September 2003, the Chamber issued an Order regulating the *Milošević* defense case.<sup>40</sup> The September Order served many purposes, one of which was to satisfy UN auditors that the additional resources to support the case were actually required and ordered by the Chamber. In



particular, it set forth the Chamber's expectation that the Registry would ensure certain procedures set out in the RPE were followed, which implied that the Chamber was not going to deviate from the standard practice; however, the Chamber also considered "that these procedures must be adapted to the fact that this Accused is representing himself, is detained in the UNDU and has limited resources at his disposal."<sup>41</sup>

With the September Order, the relationship between Milošević and the Registry was expanded. The Chamber ordered the Registry to provide Milošević with facilities, in a privileged setting, to confer with witnesses and others relevant to his defense and to review and work with documents and other materials; logistical support with regard to witnesses; and facilities to prepare for the presentation of his case.<sup>42</sup> Throughout the defense phase, the authority of the Registry to justify providing the self-represented accused additional services and facilities continued to be derived from the September Order; the Chamber did not issue any further orders regarding the adequacy of the facilities, only adding that the same requirements continued to apply.<sup>43</sup>

Still, after the closing of the Prosecution's case,<sup>44</sup> the replacement of Judge May with Judge Bonomy, and the appointment of Judge Robinson as Presiding Judge,<sup>45</sup> a new approach emerged, evident both for the bench and Milošević. For example, the Chamber required Milošević to file a list of witnesses he intended to call, including a summary of the facts on which each witness would testify,<sup>46</sup> and a list of exhibits he intended to offer; he was also obliged to supply the Prosecutor with copies of the exhibits.<sup>47</sup> This requirement surprised many, including Milošević. How could a self-represented accused, who did not recognize the legitimacy of the Tribunal and who had never submitted a filing before the Tribunal—as it would contradict his position—be realistically expected to satisfy such an order?

The change in tactics required the Registry to become much more closely involved with the administration of Milošević's case. The Registrar, Hans Holthuis, along with David Tolbert, the Deputy Registrar, commissioned a proposal from the Court Management and Services Section, or CMSS, to provide the Chamber with a solution: CMSS proposed designating a Registry liaison officer to assist with the management of the self-represented case, listing the services the liaison



would provide.<sup>48</sup> In March 2004, I was named the *Pro Se* Legal Liaison Officer, but on an ad hoc basis—and not before Holthuis visited Milošević at the UNDU to seek his acceptance of the services to be provided. Holthuis understood that without the agreement of Milošević, the rationale for a liaison would fail. To our surprise, Milošević accepted the proposal, but only on the condition that he knew who Holthuis would assign as the Registry liaison officer. Holthuis advised Milošević that I would be the liaison officer, and he agreed.

I would be the primary channel of communication between the Accused, relevant sections of the Registry, the Trial Chamber, and the Prosecution in the preparation and presentation of the defense case. The communication between Milošević and me was achieved through meetings at the Tribunal before or after court proceedings, telephone calls during the working hours of the Tribunal, and meetings at the UNDU, particularly when court was not in session. I was assigned to also play a coordination role by providing information related to the RPE, the expected Trial Chamber procedure, or any administrative practice. The most important task that evolved during the process, however, was to assist Milošević by indirectly making written submissions to the Chamber. I was not permitted to provide legal advice.

The role of liaison officer turned out to be a challenging one both inside and outside the institution. The model was arduous for some Tribunal officials to accept: Some argued that because Milošević had chosen to represent himself, he should deal with the consequences. (The same sentiments seem to have been shared within state systems prior to their reforms.<sup>49</sup>) As an official of the court, I dealt with Milošević directly, often daily. Although the *Pro Se* Office was a part of the Registry, it was mandated to support the Defense impartially. Yet I was exposed to Milošević's stories, concerns, and circumstances, and had to resolve administrative, often more technical problems—where possible—while at the same time trying not to get involved.

Through the years of the trial, familiar habits began to emerge in my interactions with Milošević. Stressful mornings were interrupted with melodies of Frank Sinatra or jokes about the prosecution. (Ironically, Geoffrey Nice would also often enter the courtroom humming a jazz tune.) Once he discovered my origins, Milošević chose to focus on them: He often introduced me to his witnesses as an Iraqi-Assyrian, forgetting to

mention the American part of my split identity. I would joke with him about my split identity, which he for some reason did not believe existed—he would repeat that I was an Assyrian from Iraq. As one might expect, identity was an important topic for Milošević. He often expressed frustration that with the expansion of the EU, Serbian identity would be diluted to an imagined memory of what it once was. But he was also angry about the invasion of Iraq. The SFRY and FRY had had a history of good relations with Iraq, perhaps because of the common Western enemy against which they battled. Milošević spent many hours explaining to me how much he loved Iraq and its history—an especially frequent topic in 2004, just before I made my first trip back to the country since 1979. He reminded me of how glorious Baghdad had been, including the famous al-Rashid Street. He would generally mention the people, not the leadership, though it became clear to me that much of his discovery of historical Iraq was through Saddam Hussein's eyes.

As I am a nonsmoker, court breaks and visits to the UNDU were the hardest because our meetings would be engulfed with smoke; I would return to the office reeking of the wretched smell. During court breaks, most of the participants would run to get their coffee; I would do the same and then run back to the small holding cell room next to Courtroom One, the main courtroom at the ICTY, to see if Milošević needed anything from me for the next hearing. Through the years, he would make random observations about my graying hair or suggest I should not drink coffee. "It's not good for you, Evelyn," he would say with a smirk. Once, after receiving his unsolicited advice, I told him I would quit drinking coffee if he would quit smoking. No deal was brokered.

On another occasion, I was preparing to return home to California, as I always did during the court recess, and Milošević asked for a favor: He wanted me to indulge in some cabernet sauvignon from the Jordan winery for him; he said that Jordan's cabernet sauvignon was one of his favorite wines. He would later seek permission from the UNDU Commanding Officer to have a glass of red wine with his meal every evening; he argued that it would assist in lowering his blood pressure, but the Commanding Officer was not persuaded.

Seven years have passed; it is difficult to reflect on the more substantive exchanges in our relationship, as the strictures governing privileged communications continue to bind the institution to which I

remain loyal. So, these informal exchanges—for me, these memories—signify the commonplace engagement between two persons, unexpectedly brought together at a time of great significance to history, which marked my relationship to Milošević.

As the trial progressed, it became evident that it was of utmost importance for me, as the liaison officer, to maintain neutrality at all times—the more so as I became, involuntarily, the face of the Accused and therefore had to confront challenges behind the scenes. Colleagues who did not know me well questioned my neutrality. The Chief of the Victims and Witnesses Section channeled her anger toward me because resources were being diverted from her budget; seemingly, she did not comprehend that the Chamber had ordered her section, as a part of the Registry, to support the Accused in bringing witnesses. She was not alone; most people in the Registry did not understand how to manage this very complicated situation. I heard passing references to the Stockholm syndrome directed toward me. I never shared my personal thoughts with my colleagues; instead I bartered and debated with those individuals who, I felt, did not understand the principles behind the service-oriented section to which they belonged.\* I kept silent when it came to my strategy to build Milošević's trust.

A liaison must act as a reliable and useful conduit. This is the basic strategy used by negotiators, and court officials need the same skills in trying to encourage a self-represented accused—suspicious, demonized in the media, and unwilling to recognize the institution's legitimacy—to participate in the trial process; I certainly saw myself as playing a similar role. The cultivation of a conduit role has both an advantage and a disadvantage for the judicial institution: The liaison establishes a unique level of communication, and precisely for that reason, is expected to channel information to other parties, but the accused also knows this, and therefore the cultivation of a conduit role depends on the meshing of personalities.

So, it is not enough to establish an institution with a mandate to be impartial and neutral—it is essential that the other participants believe it. Did Milošević believe it when the Registry informed him that its services would be provided to him by a neutral, impartial conduit? The role of the emissary is vital to ensuring the trial process moves forward; however, if that person does not build a relationship of trust, the method will not work.

Milošević appeared to develop a level of detached trust in me—trusting me without allowing himself to get too close—and perhaps he knew that I stood fast to my neutrality. Yet the very fact of neutrality—which implies not being a partisan for *either* side, and therefore not for the Accused either—makes it difficult to establish full trust. Milošević could trust his Legal Associates’ loyalty, but I am not convinced that, as liaison, I could have achieved that. The process is therefore about the significance of the relationship and of designing a line of communication that builds off respect for each other, with a mutual understanding of matters on which both may not always agree.

All of this takes time. For two years, before I was designated the Liaison Officer, I was the Registry Court Officer assigned to the case, working directly, intensively, and cordially with Milošević, and without this prior connection it is doubtful that my role as a conduit could have become operational nearly as quickly, or even that Milošević would ever have accepted the new arrangement. That actual work had been more typical of the Registry—transmitting copies of exhibits, transcripts, court filings—but here it was directed to the Accused rather than to counsel. Often, when he intended to tender documents as exhibits, the court officer would also facilitate the submission of the document for translation to the language department, something not done in represented cases, but necessary here because the judges refused to admit documents without having them first translated. As Milošević did not recognize the Tribunal, he also required his Legal Associates to work through me and not directly with the Chamber. With their trust and assistance, I was successful in helping bring order to what Milošević often termed “organized chaos.” The liaison system proved to be successful in getting valuable information before the Chamber, especially as the Chamber did not expect him to be actively engaged in the defense phase. As Liaison Officer, I would transmit documents or lists of witnesses to call, for example, often cross-referencing materials with whatever Order to which the Accused was responding. This was the only way the material could be formally filed before the Chamber, so those participating in the proceedings could be seized of the information. At times, at Milošević’s instruction, I submitted certain information to the Chamber, but not the Prosecution.

As a result of the Chamber’s strict expectations, the questions and concerns about how to ensure a fair and efficient trial, which Judge May



had raised early in the trial, appeared to be resolved. I eventually requested to be assigned an administrative assistant and a deputy liaison officer. With the two additional staff members, the *Pro Se* Office was created, albeit on an ad hoc basis. The Office spent many hours collating, labeling, and organizing Milošević's thousands of exhibits, all with the goal of ensuring that the material was in proper form to be disclosed to the Prosecution and Chamber. At the time, it was accepted that without this administrative support, the Prosecution and the Chamber would not have received the case material.

This cooperation was reciprocal. Even though the *Pro Se* Office's liaison work was with the Accused, without having a strong, cooperative Prosecution team, the model would have collapsed. And, although the Prosecution insisted on having counsel imposed upon Milošević, behind the scenes, due to the work of an excellent trial support team, the machinery functioned without a hitch. Countless hours were spent by the Prosecution's case managers patiently communicating with the *Pro Se* Office, disclosing material to the Accused, often repeatedly, without any frustrating glares because it was silently understood that the work needed to be done with flexibility. The Office also facilitated communication with the Victims and Witnesses Section; as a result, it was necessary to contact witnesses on Milošević's list, organize their travel, and identify the material Milošević intended to tender into evidence for each witness, in order to satisfy the disclosure obligations. These reciprocal aspects highlighted the implicit dual purpose of the liaison process, which was both to bring Milošević into the trial process and to do so in a way that made the defense function coequal with the Prosecution and Registry.

Finally, the liaison relationship also proved to be important when Assigned Counsel—the former *Amici*—were appointed in September 2004.<sup>50</sup> The Chamber instructed the Registry to provide the same assistance and information gathered from the Accused and his Associates directly to the Assigned Counsel. Milošević refused to cooperate with the Assigned Counsel, but he did not object to the information already disclosed to the Liaison Office being provided to them.<sup>51</sup> Although the Assigned Counsel subsequently filed submissions on his behalf, Milošević refused to speak to them except indirectly through the Liaison Officer or his Legal Associates.<sup>52</sup>

The decision to establish the *Pro Se* Office and its work in assisting with the administration of the defense case remain in the shadows because the work of the Office was conducted behind the scenes. Its work remains invisible in another way too: Although the trial was nearly over when Milošević died, there was no final judgment, and so it remains unclear whether the ad hoc system put in place was a success. Yet today, though still based on jurisprudence repeatedly upholding the right to representation, the model tested in the *Milošević* trial has evolved into a basic set of principles about what facilities and access to justice should be available to a self-represented accused. Since *Milošević*, its precedent has been applied and extended in four subsequent cases: *Krajišnik*, *Šešelj*, *Tolimir*, and *Karadžić*.<sup>53</sup> In the *Karadžić* case in particular, the procedure has evolved into a multifaceted approach to representation—a more complex model that applies the lessons learned from *Milošević*, especially from the perspective of the Accused.

## **V. Evolution toward a Multifaceted Approach: Representational Liaison after *Milošević***

After Milošević's death, the *Pro Se* Office was dismantled, its materials boxed away for archiving. Yet, shortly after the arrest and transfer of Radovan Karadžić in July 2008, the Registrar reactivated the office, this time formalizing it within the Registry section.<sup>\*</sup> Although this Office is in many ways the same one that served in the *Milošević* trial, many variations are at play, which affect its role and effectiveness.

For one, the directness, immediacy, and visibility of peripheral legal support for self-representing accused have all increased. In the *Milošević* trial, the Legal Associates had been prohibited from participating directly or visibly in the trial process; any communication from them to the Judges always went through the Liaison Officer and not through written submissions. The approach in *Karadžić* is more complex and integrated; indeed, it seems that both Karadžić and the Chamber are applying the lessons learned from the *Milošević* trial. Karadžić's legal advisor engages directly with the Chamber, in particular, on legal issues, and the team supporting Karadžić is organized as a traditional defense team, with

Karadžić as lead counsel.<sup>54</sup> The *Karadžić* team has also recruited international lawyers—some former ICTY senior legal staff—as pro bono experts.

Karadžić’s own interactions with and arguments before the Chamber are quite different from Milošević’s, which often angered the judges; this too has affected the work of the *Pro Se* Office. The ICTY was surprised by Karadžić’s cooperative approach; indeed, the initial assumption was that he would follow Milošević’s more detached, uncooperative example. Yet from the beginning, when he was first placed in custody and later made his initial appearance, Karadžić was, unlike Milošević, willing to speak to Tribunal officials, be served with the indictment, and sign any necessary documents, which made the work of court officials much more straightforward and reduced the need to conduct work indirectly through the *Pro Se* Office.

Other differences involving the financing of trials have made the Registry’s role more rather than less salient. When an accused chooses to self-represent, the ICTY’s usual models for legal aid and assignment of counsel do not apply. As Milošević did not seek legal aid, that aspect of the Registry’s services was never challenged, except when it came to the costs for the *Amici* and Assigned Counsel,<sup>\*</sup> so the complexities of funding legal support for a self-represented accused did not arise—as they did in the *Krajišnik*, *Šešelj* and *Karadžić* trials.<sup>†</sup> In *Krajišnik*, the Appeals Chamber dealt with the issue of whether a self-represented accused is entitled to legal aid, and held that an accused faced a binary choice: “An accused who chooses to self-represent is not entitled to legal assistance. Hence, he is not entitled to the subsidiary right ... to have legal assistance paid for by the Tribunal if he is indigent.”<sup>55</sup> Nevertheless, the Chamber went on to state that the Registry “should adequately reimburse the legal associates for their coordinating work and for related legal consultations.”<sup>56</sup>

In the *Krajišnik* Appeal case, the Registry established the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused;<sup>57</sup> the Remuneration Scheme was later amended to reflect the Pre-Trial Chamber’s findings in *Karadžić*.<sup>58</sup> In addition to addressing the payment for services provided to indigent, self-represented accused, the Remuneration Scheme relaxes the eligibility requirement for a Legal



Associate.<sup>59</sup> Legal Associates are also granted privileged access to the accused, but all team members are required to sign a confidentiality undertaking before receiving access to protected information, and legal associates are required to undertake to comply with the same standards that apply to full counsel appearing before the ICTY.<sup>‡</sup> Although the Remuneration Scheme applies only to indigent, self-represented accused, the model would have proven to be of great assistance to Milošević, as he often only had one Legal Associate at the ICTY at one time due to a lack of funding. (I can count on one hand periods when all three Legal Associates were at the ICTY at the same time; they would travel on a rotational basis, as two of them ran successful law firms in Belgrade and were representing high-profile clients there as well.)

Finally, the new, integrated model of self-representation produces a different dynamic for dealing with courtroom discipline; a responsive model was first developed in the *Milošević* trial, but not tested until subsequent cases. In *Milošević*, the challenge faced by the Chamber was how to ensure that a self-represented accused could be held accountable if he violated the Tribunal's rules or orders. The Code of Conduct and the Directive on Assignment of Counsel<sup>60</sup> did not apply explicitly or automatically to someone providing legal advice to a self-represented accused informally outside the courtroom process; the Chamber, with the assistance of the Registry, tried to go beyond normal practice by treating the Legal Associates as counsel and thus requiring them to sign confidentiality undertakings, which they did.<sup>61</sup> The problem, of course, was that the lead counsel—the Accused himself—was not required to sign the same undertaking, yet he was in essence the head of the team, and the person with the authority to instruct the others. As it happened, there was no breach of confidentiality during *Milošević*, and so the model was not tested until the *Šešelj* trial.

While on trial, Vojislav Šešelj, representing himself, was held in contempt for disclosing protected information to the public and thus putting the life of the protected witnesses in danger—the first time the Chamber had applied its inherent contempt power to hold a self-represented accused accountable.\* Even though Šešelj had not signed an undertaking, the Chamber recognized that it was nonetheless implicitly essential that a self-represented accused also abide by protective orders,



and that it was therefore appropriate to condition his access to confidential documents on such an undertaking.<sup>†</sup>

This is a vital development considering that a self-represented accused has full access to material that is often under very strict protective measure provisions. As the authority to grant access to protected material is at the discretion of the judges, often the protective measure orders lay out the obligation not to disclose the information; however, as with any counsel or staff representing an accused, there should be an added requirement to sign a confidentiality undertaking, rather than relying on the contempt power alone. Currently, the requirement is imposed only on Legal Associates and the staff who are also assigned to assist the defense team; short of full contempt proceedings, however, it is difficult for the institution to hold pro bono staff accountable, and in such cases, the Registry has requested that these individuals be given access only to public materials.<sup>62</sup>

Even though there was no significant breach of confidentiality in *Milošević*, this kind of more assertive approach by the Chamber to a self-represented accused's prerogatives and obligations would have had a more general impact. Had such a procedure been in place (or had it been thought possible to invoke it) during his trial, Milošević—who was frequently combative—could have been prosecuted under inherent contempt powers, and this might have dramatically altered the balance of forces that contributed to the length and difficulty of the proceedings. Whether this would have constituted a better approach is, of course, a separate question.

## **VI. Conclusion: Administering Justice to the Self-Represented Accused**

The initial concept of developing an administrative system to support a self-represented accused at the ICTY was the vision of the late Judge May. While presiding over the prosecution phase of the trial, he often appeared frustrated and stern when Milošević continually challenged the Chamber. Outside of the hearing environment, he would often voice his concerns in a different register, trying to work out how Milošević would technically put forth his defense case. Indeed, that was a problem for the institution,

especially when, at the time, Milošević was refusing to cooperate with or recognize it. Judge May understood at a much earlier stage that without Milošević participating integrally in the trial process, there would not be a defense case, and this would impugn the integrity and fairness of a final judgment and the trial as a whole.\*

What does integral participation mean to the Tribunal? It means more than technically competent preparation, though that is essential too: the real challenge for the institution was to secure Milošević's consent to the process, even if only implicitly. The Chamber first appointed *Amici* and then Assigned Counsel to assist with the case, but because Milošević did not cooperate and refused to communicate with those individuals, it ordered the more integral involvement of the Registry through the newly designed *Pro Se* Office. Although the Office did much technical work, its key role was in trying to establish the basis for that consent and cooperation.

With the *Pro Se* Office, the ICTY introduced a more coordinated system for self-representation by allowing Milošević to have adequate access to justice through the Registry. The Chamber understood that it was essential to build this bridge behind the scenes; only in this indirect way could the *Pro Se* Office secure Milošević's cooperation with the Tribunal. This took time, but this is less of a problem if the role of the *Pro Se* Office is complementary to an existing defense team, as in the *Karadžić* trial.

Is this a model to be used by all international or hybrid tribunals? The answer depends on whether the defense is represented by an independent pillar, as it is at the Special Tribunal for Lebanon.<sup>†</sup> The liaison model fits more logically within a dedicated Defence Office, as it would clearly fall in line with its general mandate.<sup>63</sup> At the ICTY, this fourth pillar does not exist. Likewise, at the ICC, the responsibility to provide facilities to the defense remains the responsibility of the Registry as a neutral organ. Although it is possible for the model to function adequately if it remains under the authority of the Registrar, as it did in the *Milošević* trial, in such a case the boundaries between the *Pro Se* Office and a self-represented accused must be clear to ensure that neutrality of Registry is not compromised.

At the ICTY, the pro se liaison system succeeded in establishing clear boundaries for communicating with self-represented defendants, but this

system also involved the building of relations, albeit indirectly, with all three organs of the Tribunal, which provided an inherent balance and a measure of interdependence. This process does not work if there is a belief or practice that only one of the organ's work matters to achieve justice, and especially if the equal, autonomous value of the defense component is not recognized. As a trial progresses, the Chamber, Prosecution, and Registry develop a dependency on each other, often resulting in the exclusion of the self-represented accused. The goal of the liaison system, first developed in *Milošević*, is therefore not only to bring the self-represented defendant into the trial process, but to ensure that he is incorporated into it on equal terms as well. These elements of balance will be easier to achieve in an institutional setting that incorporates the defense bar as a coequal element of the trial process.

Self-representation may or may not be a good idea—it does certain things for defendants, but has real costs to them and the institutions—but in many ICL contexts, it is a statutory right (and for some a customary right), so courts have to be ready for the possibility. The ICTY had that obligation, but the system was not ready at the outset when Milošević invoked his right, and the initial response was piecemeal, applying standard practices with only minimal efforts at being flexible. Eventually, the Registry's approach shifted with the Trial Chamber's orders to the Registry to ensure that the adequate facilities were provided in a way that responded to the practical needs of a defendant representing himself. The *Milošević* trial was the first such effort, and it has been followed by a more clearly articulated set of integrated policies. But in building on *Milošević's* lessons and adopting a flexible approach, international tribunals and courts will only be applying lessons already learned in municipal systems that encourage the integral participation of defendants: A fair judgment can only be guaranteed by a just process.

## The Legitimacy Paradox of Self-Representation

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*The phenomenon of self-representation manifested in the Milošević trial illustrates some of the internal contradictions that the ICTY's quest for legitimacy entails. On the one hand, common considerations of procedural fairness and respect for the individual autonomy of defendants militate in favor of accommodating self-representation; on the other hand, there may be strong institutional interests in favor of conducting effective proceedings over a reasonable period of time, with which self-representation may collide. The relationship between these competing interests may be particularly complicated if a defendant's litigation strategy under-protects his own legal interests; further complexity is introduced when a tribunal's quest for legitimacy leads it to support, in the name of due process, a defendant's litigation strategy that is bent on delegitimizing the institution itself.*

In her chapter, Anoya discusses some of the difficulties that arose from Milošević's insistence on defending himself. Although the ICTY and the RPE acknowledge the right of self-representation,<sup>1</sup> the practical modalities for exercising this right were still underdeveloped by the time Milošević came to trial. Anoya describes the institutional response of the ICTY, a response of which she was an integral part: the designation of



*Amici Curiae* to provide shadow defense, the establishment of a *Pro Se* Legal Liaison Office to help Milošević arrange and coordinate his defense efforts, and the abortive assignment of counsel over his objections. In subsequent cases, the Tribunal has allowed Legal Associates and legal advisors to occupy a more prominent role in the trial process and has undertaken to fund legal assistance for indigent self-representing defendants; the liaison process Anoya helped develop and define has also, itself, been institutionalized. Ultimately, she suggests, the creation of a fourth institutional “pillar”—a defense organ working alongside the Chambers, Prosecutor, and Registry—might offer a more stable institutional framework for addressing the challenges of self-representation, while ensuring the proper conduct of criminal trials.<sup>2</sup>

Anoya herself helped design the Tribunal’s self-representation assistance mechanisms, and understandably is well-versed in their technical features, possibilities, and limits. But if the self-representation crisis of the *Milošević* trial teaches us anything, it is that the problems associated with self-representation should not be understood exclusively, or even primarily, as technical in nature—that is, as problems stemming from the need to create a new administrative framework for a legal situation whose complexity and sensitivity were underestimated at the time in which the ICTY was established. Rather, self-representation raises issues of principle that go to the very heart of a paradox underlying the whole of international criminal justice—what we may call the legitimacy paradox. Thinking about self-representation in broad but substantive theoretical terms may help us to better understand the institutional resistance to the innovations surveyed by Anoya—resistance which she herself, as Liaison Officer, personally experienced. A theoretical approach may also contextualize the problem of self-representation, placing it within a broader set of legitimacy paradoxes and helping us draw relevant lessons from other operational problems that international criminal courts now face.

## **I. The Legitimacy Paradox: Can’t Do with Self-Representation, Can’t Do without It**

Like other international courts, the effectiveness of international criminal tribunals depends to a considerable extent on their perceived legitimacy. In the absence of strong enforcement machinery, state cooperation with international criminal tribunals often depends on acceptance of their legitimate authority by political and legal elites, as well as by the broader populace of the states most affected. Moreover, some of the more ambitious goals of international criminal justice—in particular, its aim of nurturing domestic processes of accountability and political transition\*—require even deeper levels of internalization and acceptance by states and peoples of international criminal courts' legitimacy.<sup>3</sup> This combination of institutional weaknesses and ambitious mandates compels international courts to strive for a particularly high and broad measure of political and social legitimacy—a quest that appears to exceed, in its urgency and intensity, the parallel legitimacy-seeking efforts of municipal criminal courts.

Due process fulfills a critical role in establishing and maintaining the institutional legitimacy of international criminal tribunals.<sup>4</sup> By invoking internationally accepted standards of judicial practice, these courts project an image of fairness and procedural justice that alleviates some of the unique legitimacy deficits associated with having trials conducted by foreign judges who lack the usual connections with and accountability toward the people and polities over which they preside.<sup>5</sup> Commitment to due process norms also helps to legitimate and regularize the operation of judicial institutions that were created by international political bodies in a manner that is vulnerable to the criticism that they are selective in nature.<sup>6</sup>

The right of self-representation, regarded as part of the internationally recognized due process standards, plays such a legitimating role: It is a legal standard recognized in international instruments, such as the ICCPR and the European Convention on Human Rights,<sup>7</sup> and it is supported by strong moral intuitions about fairness and the need to respect a Kantian autonomy of will.<sup>8</sup> The right to self-representation is also consistent with the normal understanding of the role of the legal counsel as being first and foremost the long arm of the defendant, who remains the real party to the litigation.<sup>9</sup> Thus, had the ICTY decided to significantly restrict Milošević's right to self-representation, it would not only have violated the spirit (and letter) of its own constitutive instruments, it would have

also exposed itself to accusations of a human rights violation and a breach of notions of fair play. Quite simply, by denying Milošević the right to represent himself, the Tribunal would have delegitimized itself.

But, what if a self-representing defendant's main strategy is to delegitimize the tribunal that tries him? And what if—even where this is not the defendant's intention—the recourse to self-representation places serious strains on the trial process and tarnishes its reputation? Allowing a legally suboptimal defense and tolerating exceptionally long delays in the proceedings may also have serious human rights implications: A weak defense may lead to a wrongful conviction and thereby violate substantive due process;<sup>10</sup> excessive delays may violate the right to a speedy trial and the prohibition against prolonged preconviction detention.<sup>11</sup> Moreover, the extra time and material costs required for self-representation can erode the cost-effectiveness of tribunals, which in turn may further diminish the support afforded to them by key constituencies, such as contributing states.\* As a result, an international criminal tribunal may find itself between a rock and a hard place: it would lose legitimacy if it does not allow for self-representation, but also lose legitimacy if it does.

The *Milošević* trial illustrates this paradox to its full extent. Milošević's principal strategy was to delegitimize the ICTY and the proceedings against him;<sup>12</sup> his defense has been described as legally weak (indeed, it is commonly observed that Milošević was not interested in mounting a legal defense) and disruptive, as well as being the cause of many delays in the trial process.<sup>13</sup> In other words, his chosen defense presented challenges to the legitimacy of the ICTY on many levels. At the same time, the specter of the Chamber barring Milošević—a trained lawyer and a former head of state—from representing himself would have lent support to his claims that the trial process was biased against him and violated his human rights.<sup>14</sup> Either approach—acquiescence in Milošević's combative, political defense, or denial of his right to defend himself as he chose—created real risks for the Tribunal's claim to be a legitimate judicial institution.

Against this backdrop, the institutional dilemmas facing the ICTY and discussed by Anoya acquire heightened significance. The Chamber's affirmation of Milošević's right to self-representation may have been intended not only to uphold a due process right, but also to induce



Milošević's to cooperate with the trial process—thus conferring upon it a greater degree of legitimacy,<sup>15</sup> although at the cost of allowing him to make full use of the courtroom to denounce the Tribunal and to obstruct its proceedings. The appointment of the *Amici Curiae* at the beginning of the trial was meant to ensure that Milošević's litigation interests were ensured notwithstanding his self-representation;<sup>16</sup> however, this introduced an additional layer of procedural complication, and may have contributed to further delays in the process caused by the existence, in effect, of two defense teams. Finally, the less-than-successful move to assign counsel over Milošević's objections<sup>17</sup> was intended to address the issue of chronic delays,<sup>18</sup> but resulted in another round of legal motions and new challenges to the fairness of the process.

Perhaps of even greater interest are the creation of the *Pro Se* Office and the decision to fund legal assistance for self-representing indigent defendants. The technical responsibilities of the new Office and the availability of qualified legal assistants do not give rise, at first glance, to a serious conflict of policies—helping defendants to prepare and present materials for their defense and to coordinate with other Tribunal organs serves both procedural fairness and procedural efficiency. But this ignores the political context for the decision to self-represent, which is often made for nonlegal reasons, as was the case in *Milošević*; given this, we may well question the degree to which the Tribunal should actively support, through allocating human resources and funds, litigation efforts ultimately aimed, not simply at winning cases, but at destroying the institution's legitimacy. This tension may find expression in some of the objections to the establishment of the *Pro Se* Office described by Anoya,<sup>19</sup> as well as in the Appeals Chamber's decision in *Krajišnik* to refrain from ordering payment of an indigent self-representing defendant's legal assistance costs.<sup>20</sup>

The legitimacy paradox described above does not only pertain to self-representation. It relates to other challenges the Tribunal faced in the course of the *Milošević* proceedings, such as the latitude afforded to Milošević in conducting his defense, the number of witnesses summoned, the concealment of witness identities, the disciplining of the defendant, and more besides.\* With regard to all these issues, protecting the defendant's interests (or, at least, his self-perceived interests) may have inflicted costs on the legitimacy of the ICTY as an institution.



Interestingly enough, one may analyze through an analogous conceptual framework the Prosecution's decision to join the indictments for all three wars into a single trial: Although this aimed to increase the legitimacy of the Tribunal in the eyes of the wars' victims by telling a comprehensive story of the conflict,<sup>21</sup> it may have resulted in such an exponential increase in the complexity and length of the trial as to jeopardize its fundamental fairness and challenge the Tribunal's ability to conduct the proceedings effectively.<sup>22</sup> This, in turn, constitutes its own challenge to the Tribunal's legitimacy.

## II. The Precarious Status of Court-Appointed Legal Assistants

Another tension, which Anoya briefly touches upon, involves the conflicting loyalties of appointed liaisons and *Amici Curiae*. Although in some legal traditions all lawyers involved in litigation simultaneously serve as party representatives and officers of the court,<sup>23</sup> legal representative of defendants before international tribunals are normally expected to prioritize the best interests of their clients.<sup>24</sup> Court officials, such as the members of the Registry and *amici*, on the other hand, may be expected to prioritize the court's institutional interests.<sup>25</sup> Thus, Milošević's resistance to the designation of the *Amici Curiae*, originally appointed as advisors to the Chamber, as his Assigned Counsel may have derived from the *Amici's* mixed loyalties and their lack of perfect identification with his interests.\* In the same vein, one can understand Anoya's own concern about the possibility that Milošević would reject her liaison services as lacking in impartiality and neutrality, even if such concerns ultimately proved to be unjustified—the concern suggests the structural nature of the problem of ensuring effective and legitimate representation that can respond to the different interests of differently situated actors in the institution.

Lurking underneath this question of conflicting loyalties is a deeper tension between the need to promote procedural fairness in international criminal trials and considerations of judicial efficiency. Although it has

been suggested that the ICTY should not be measured by its number of indictments and convictions, but rather on the fairness of its proceedings,<sup>26</sup> output-related efficiency concerns cannot be neglected altogether. Fairness and efficiency concerned are at times intertwined—delays in trials may infringe both values of fairness and efficiency, for example—yet even when these two notions pull in different directions, efficiency may serve, alongside fairness, as one of the building blocks of institutional legitimacy.<sup>27</sup> Indeed, the decision whether to assign *amici curiae* or other court officials responsibilities for representing the interests of a defendant can generate a conflict between the expectation that they aid the accused in mounting an effective defense and the court's broader institutional interests (which may also reflect the interests of victims). Such a conflict may be particularly acute in cases, such as *Milošević*, in which the defendant's litigation strategy centers on obstructing the proper conduct of the trial, or otherwise seeks to delegitimize the court. In such cases, the legitimacy paradox may translate itself also into a conflict of interests for court officials and other legal professionals who find themselves entrusted with the task of aiding the defendant.

### **III. Conclusion: The Irreducible Legitimacy Paradox**

The phenomenon of self-representation, as manifested in the *Milošević* case, illustrates some of the internal contradictions that the ICTY's quest for legitimacy entails. On the one hand, common considerations of procedural fairness and respect for the individual autonomy of defendants militate in favor of accommodating self-representation; on the other hand, there may be strong institutional interests in favor of conducting effective proceedings over a reasonable period of time, with which self-representation may collide. The relationship between these competing interests may be particularly complicated if the defendant's litigation strategy under-protects his own legal interests, and further complexity is introduced when a court's quest for legitimacy leads it to support, in the name of due process, a defendant's litigation strategy bent on delegitimizing the court itself.

The potential conflict between competing demands of representing the defendant and the court's interests, in which court officials and *amici curiae* may find themselves, can be addressed to some degree by the solution Anoya identifies: the establishment of a "fourth pillar"—an independent Office of Defense. Still, even then, questions would remain about the quantity and quality of resources allocated to such an Office, its procedural powers, and the ultimate loyalty of its employees. These go to the heart of the legitimacy paradox in modern international criminal justice, which is neither reducible to, nor solvable by, purely technical fixes.

## **PART THREE**

### **Reporting the Demise**

From its first day, impressions of the trial varied widely—from dramatic catharsis to the tedium of an actual trial in real time. This section examines the role of popular perception, elite narrative, and media in the trial. What role did media play in crafting perceptions? How did the parties use or abuse public aspects of the trial? Did events in the courtroom shape attitudes in the former conflict zone, and were courtroom strategies themselves affected by perceptions in the former Yugoslavia? The section focuses particularly on reactions and attitudes in Bosnia, Kosovo, and Croatia—among the victim populations—as well as among the corps of international journalists covering the trial.



## Guilty without a Verdict

### Bosniaks' Perceptions of the *Milošević* Trial

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*This chapter examines the legacy of the Milošević trial from the perspective of the Bosniaks—an important concern given that Bosniaks, who suffered the greatest losses during the war, have had the greatest hopes for what the trial could accomplish. Analysis of Bosniak media and interviews with a cross-section of Bosniaks shows that, although attitudes differed somewhat on the extent to which the trial had any real effect, Bosniaks generally shared dissatisfaction and anger with the trial process, Milošević's escape from justice (that is, from what they expected to be a guilty verdict), and the fact that contemporary political and social realities (such as the continuation of genocide denial) do not appear to have been ameliorated by the Tribunal more broadly or the Milošević trial in particular. These conclusions support concerns within the transitional justice literature about the limited utility of criminal trials for wider socio-political reconciliation. Still, although Bosniaks appear skeptical about the effects of the Milošević trial, on balance they believe that even a partial trial, and the copious evidence it produced, will likely have a long-term positive effect on the creation of a common truth in the region concerning Milošević's and Serbia's roles in the crimes of the past.*

# I. Shattering High Expectations: The Continuing Pattern of Bosniak Disenchantment

Slobodan Milošević's trial, death, and legacy are of concern to people all over the former Yugoslavia, but nowhere more than in Bosnia, where the consequences of Yugoslavia's collapse were most catastrophic. Yet few studies have examined specifically how Bosniaks of different backgrounds perceive this monumental trial<sup>1</sup>—or, for that matter, its effects on Bosnia itself—the most fragile of all the Yugoslav successor states. What was the general perspective of Bosniaks and Bosnian media on the trial, Milošević's death, and subsequent lack of a verdict? Relatedly, what have been the effects of these attitudes and of the terminated trial on Bosnian politics, inter-ethnic relations, and reconciliation more generally? Was this trial significant for Bosniaks and for Bosnia?

These questions are significant for several reasons. The expectations for what the *Milošević* trial could achieve were quite high—as other chapters note, many observers and the ICTY itself had characterized the *Milošević* trial as an important contribution to justice and reconciliation in the region; it was to be “the trial of the century,” and a landmark in the development of ICL.\* These effects were particularly anticipated for Bosnia, which, 18 years after the war, is still characterized by fragility, division, and competing narratives, making discussions of justice and reconciliation particularly relevant.<sup>2</sup>

This chapter analyzes evidence of the *Milošević* trial's effects on Bosniak attitudes in relation to: reconciliation, understood as effects increasing or reducing inter-ethnic accommodation;<sup>†</sup> victims' recovery; and Bosnian politics and the state of nationalism, including responses to the International Court of Justice's *Bosnian Genocide* case.<sup>‡</sup> Identifying a single Bosniak perspective on the *Milošević* trial is a quixotic effort; it is hardly tenable to suppose that the Mothers of Srebrenica, Bosniak professors, and Bosniak politicians share uniform social and political views.<sup>§</sup> There are also obvious methodological challenges in any attempt to isolate and measure the causal effects of the Tribunal, let alone a single trial—identifying the causal relationship between the ICTY's work and attitudes or behavior “is a task fraught with complexity.”<sup>3</sup> Nevertheless, it

is possible to speak of general trends and attitudes without necessarily making causal claims.<sup>3</sup> Although there is variation and nuance, the overwhelming response of Bosniaks and the Bosniak-oriented media to Milošević's trial and death has been anger, disappointment, and regret, with special criticism directed at the international community.<sup>\*</sup> Moreover, the trial reinforced existing narratives about the war and responsibility for atrocities: Bosniaks have interpreted the trial as just another event in a long pattern of being on the losing end—harmed by their neighbors and the international community—going back at least to 1992.<sup>4</sup>

We must be careful not to overstate the relationship of this sensibility to this one trial. Indeed, for most Bosniaks, the legacy of Milošević's trial simply has not had a major impact on their daily lives—those who have suffered most directly, such as families of victims of the Srebrenica genocide, are the exception for whom the trial had immediate meaning. Still, although there is no evidence that the *Milošević* trial, considered in isolation, had any independent, direct effect in Bosnia, the trial has contributed to a number of limited effects within Bosnia and for Bosniaks.<sup>†</sup>

Some of these effects—social, political, and legal in nature—represent competing claims and perspectives among Bosniaks, mirroring, to some extent, tensions within the literature on transitional justice about the effectiveness and importance of criminal trials for victim recovery and inter-ethnic reconciliation.<sup>5</sup> The effects of the *Milošević* trial—though limited and indirect—are mostly perceived by Bosniaks as negative. Nevertheless, Bosniaks do insist that the trial made a positive contribution to the historical and legal record, in ways that will have an effect on long-term reconciliation.

## **II. The Context for Interpretation: Bosniak Perspectives on Transitional Justice and the Tribunal**

It is important to recall the context against which contemporary Bosniak perspectives have developed and through which Bosniaks interpreted the

indictment, trial, and death of Milošević. The central narrative among Bosniaks in relation to the wars in the former Yugoslavia generally parallels the most common view in the international community: Bosniaks see themselves as victims of Serb aggression, orchestrated by Milošević and characterized by the siege of Sarajevo, ethnic cleansing, concentration and rape camps, and genocide at Srebrenica and elsewhere.<sup>6</sup> Although many Bosniaks admit that the *Armija Republike Bosne i Hercegovine* (Army of the Republic of Bosnia and Herzegovina or ARBiH) committed crimes as well, they maintain they were disproportionately the victims of killing and mass rape—a view confirmed by ICTY records and independent analysis.<sup>‡</sup>

The postwar dispensation has done little to ameliorate this sense of victimization or promote inter-ethnic accommodation. Since Dayton, Bosnian politics have been characterized by ethno-territorial division, nationalist rhetoric, and contested narratives over past crimes and the future of the state.<sup>7</sup> Although Bosniaks acknowledge that Dayton was successful in stopping the conflict, in general they have negative views of its political consequences, and many argue that the United States was more interested in ending the war than in promoting justice.<sup>\*</sup> Most difficult to accept, particularly for Bosniak political elites, is the continued existence of the RS, perceived as a product of and reward for genocide. There is an almost constant negotiation and struggle between greater centralization and unity, favored by most Bosniaks, and more decentralized, entity-level control, favored by most Serbs, a debate that also implicates integration with the EU.

This critical view toward Bosnia's contemporary political situation and the role the international community has played in the postwar period is reflected in Bosniaks' mixed attitudes toward transitional justice and the Tribunal. Of all the communities in Bosnia, Bosniaks have had the highest expectations for what the Tribunal could achieve, have given the strongest support to the institution, and were most likely to believe that the Tribunal could achieve the numerous goals of transitional justice and beyond. For precisely these reasons, however, the Tribunal that undertook the *Milošević* trial did not stand much of a chance of living up to the standards that many Bosniaks had set.



Ethno-national identity has generally been a good indicator of attitudes toward the ICTY in Bosnia; survey research generally finds that Bosniaks have been the most supportive of the Tribunal and are more likely than other groups to see the Tribunal as playing a role in peace building.<sup>8</sup> This is understandable, because Bosniaks see the institution as punishing those responsible for their abuse and suffering. A February 2002 public opinion survey found the ICTY trusted by a slight majority of respondents in the Bosniak-Croat Federation, but by very few people in the RS.<sup>9</sup> Other surveys of different segments of society, such as members of NGOs<sup>10</sup> and the armed forces,<sup>†</sup> find much stronger support of the ICTY by all ethnic groups, but especially among Bosniaks. Other public opinion surveys found that comparatively, Bosniaks were much more likely to agree that the ICTY is a precondition for a just peace and normal relations,<sup>11</sup> and to see the ICTY as more “fair” than did other groups.<sup>12</sup> Finally, Bosniaks were the least likely to see the ICTY as political or as an obstruction to peace.<sup>13</sup> Unsurprisingly, almost all Bosniaks viewed Milošević as “very negative.”<sup>14</sup>

This generally more positive orientation toward the ICTY has not been without its countercurrents. Given that Bosniaks had such strong hopes for what the court could achieve, they have also been one of its biggest critics when reality did not match with expectations. All Bosniak interlocutors consulted for this chapter reinforced survey research in terms of having had very high hopes for the outcome of criminal trials. Munira Subašić, leader of the Mothers of Enclaves of Srebrenica and Žepa, for example, said that all of the group’s members saw Milošević as the main culprit of the genocide and that, as the trial was going on, they all “spoke with the language of hope and conviction” that the trial would bring some kind of justice.<sup>15</sup> Yet many Bosniak respondents question if the ICTY’s trials have contributed to any tangible changes in postwar politics or their own recovery, stating that the trials have ignored the politics and daily social relations on the ground where nationalism and denial of past wrongdoings is still strong.<sup>16</sup>

In part, these views may derive from low levels of knowledge and understanding of the Tribunal, due to media bias and the lateness of the Outreach program that the ICTY finally created in 1999.<sup>17</sup> Media is the

main source of information about the Tribunal for most Bosnians, and that coverage tends to focus on negative or dramatic events, and less on legal or technical information.<sup>18</sup> However, these attitudes may also reflect Bosniaks' substantive evaluations about the limited effect the Tribunal has had on regional politics: As Bieber's and Trix's chapters suggest, political agendas similar to those during the war are still alive in the region or at least viewed as legitimate; given Bosniaks' views, one should be careful about assuming that revealing the truth will lead to reconciliation.

Bosniaks' varied views mirror debates on transitional justice more generally. Although there is now little question of the need for some type of transitional justice in post-conflict societies,<sup>19</sup> there is disagreement about the best type of mechanism—criminal trials, truth commissions, amnesty, or more informal processes—and whether criminal trials actually produce or lead to the positive benefits their supporters claim.\* The claim within the transitional justice literature that trials are weakly correlated with reconciliation fits within the realist tradition at the intersection of international relations and international legal scholarship, which is skeptical of the independent power of international law to affect domestic society and politics and to tame rational self-interested actors.<sup>20</sup> Realism considers international law a product of power and politics—a similar criticism to that leveled against the ICTY by many Bosniaks.

At the same time, some of the effects and legacies of the Tribunal and the trial can be understood from a constructivist framework, which views international law and institutions as diffusers of norms such as the rule of law, transitional justice, and human rights.<sup>21</sup> Scholars within this vein believe that the ICTY has contributed to democratization processes in the Balkans and to the development and strengthening of new norms. Consistent with this perspective, some Bosniak respondents also expressed more long-term views that, despite the lack of a verdict, the trial was beneficial in sending a message against impunity and in support of the rule of law.

As we have seen, Bosniaks have generally viewed the Tribunal's overall pattern of prosecution as generally consistent with their own view of the conflict; as a consequence, the most significant criticisms Bosniaks have leveled against the Tribunal have been specific, concerning long and complicated trials, inadequate sentences, and plea bargains. The nature of

the latter two concerns—suggesting as they do that almost no sentence is strong enough to satisfy victims’ suffering<sup>22</sup>—may indicate that many Bosniaks experience victim’s syndrome, a sense of collective victimhood.<sup>23</sup> This also implies a belief in the collective guilt of the perpetrators, a point to which we shall return.<sup>24</sup> More broadly, the many years it took to apprehend two central indictees related to the Srebrenica genocide—Karadžić and Mladić—and, perhaps even more significantly, the loss of Bosnia’s genocide case against Serbia at the ICJ have reinforced the negative impressions that, as we will now see, formed around the *Milošević* trial.

### **III. Reactions to the Trial: The Wrong Victims**

For Munira Subašić, who lost 22 members of her family at Srebrenica, the announcement that Milošević would be transferred to stand trial at the ICTY was “the best news, the best justice.”<sup>25</sup> This sentiment was similar for many Bosnians who saw Milošević as the main culprit of the war and the crimes in Bosnia.<sup>26</sup> Nevertheless, the strong Bosniak support for the Tribunal and the momentousness of a head of state appearing in an international court to answer for his crimes was not, over time, sufficient to insulate the trial from critiques about how that process played out.

The arrest and transfer of Milošević and the eventual start of his trial were watched closely in Bosnia and covered extensively by the media in the beginning, but—much as other chapters have shown for Serbs and Kosovars—Bosnians from all backgrounds lost interest in a long trial that was seen as too technical and boring.<sup>27</sup> Negative reactions became more pronounced: The trial gave Milošević a public platform and an audience, something that Bosniak victims in particular saw as antithetical to justice.<sup>28</sup>

One Sarajevan journalist describes Milosevic as acting like a prosecutor against a “big international conspiracy” to the detriment of the integrity of the trial process:

With that kind of strategy, he was gaining time and also obvious strategic advantage over the Tribunal and he further succeeded in fueling the sentiments against the



tribunal. Prosecutor and judges did not succeed in restraining or controlling him and preventing him from misusing the process and stealing time. In that sense, if this led to the tribunal's fiasco, then the blame for it only belongs to the tribunal.<sup>29</sup>

Milošević's courtroom tactics were directed at his principal audience—the Serbs—who were made out to be victims, but those same tactics naturally were viewed differently by Bosniaks, who understood themselves to be the principal victims of Milošević and the Serbs. If one of the goals of the trial was to give voice to victims, in its actual implementation it was perceived as giving greater voice to the perpetrators. Bosniaks argued that the Tribunal should not have allowed Milošević to make a mockery of the trial, the judges, and particularly the witnesses, thus creating a “circus”—a term frequently invoked to describe the trial.<sup>30</sup>

For many Bosniaks, the way in which Milošević conducted the trial led to the revictimization of many of the witnesses. Referring to the many members of her group who were (unprotected) witnesses in *Milošević* and other trials, Subašić said that they were forced to relive horrible experiences and listen to repeated denials that any atrocities were committed by Serbs—this felt like the Tribunal was “just killing us,” she said.<sup>31</sup> This effect was particularly pronounced in the cross-examination of witnesses “who were illiterate, impoverished, or otherwise vulnerable[;] he was dismissive and abusive.”<sup>32</sup> Bosniak war veteran Enver Redžanović who closely followed the trial agreed: “I remember during the interrogation of witnesses, semi-literate women did not know how to respond to his interrogation; his method was of diminishing [others]—they were not his equals.”<sup>33</sup>

Additionally, Bosniaks' perceptions about the trial process reinforced their continued and general distrust of the international community. Many Bosniaks believe that despite their public claims to be supporting a unified Bosnia (and Bosniaks as victims), the major powers in fact made political decisions that supported their wider interests, which included integrating Serbia as an accepted, “normal” European country. One political scientist commented that “By the same ironical twist of fate, it [the trial] brought many Bosnians to the same conclusion that Milošević had about the Hague court—that it is politically instrumentalized, especially in terms of hiding the guilt of the international community in all of that.”<sup>34</sup> Another respondent reinforced this view by comparing *Milošević* with the later ICJ



*Bosnian Genocide* case, in which Serbia was exonerated for responsibility for genocide, seeing both cases as protecting Serbia.<sup>35\*</sup>

Beyond general complaints about Milošević dominating the proceedings, however, respondents did not present much concrete evidence for their claims that the court was politicized. Instead, these attitudes appeared impressionistic and grounded in positional identities—and therefore mirrored the views of many Serbs who have claimed to see political bias at the Tribunal. As we will see, this makes it difficult for the ICTY in general or the *Milošević* trial in particular to contribute to a common narrative or truth about the past that might aid in reconciliation.

In short, as time went on, Bosniaks became more disillusioned with the *Milošević* trial, just as they did with the Tribunal more generally. Clearly, Bosniaks' present attitudes about the trial are in part a function of the trial's termination, which served to deepen negative sentiments that were already forming. If the trial had ended in a guilty verdict, then the criticisms of the trial itself would likely have been muted; however with Milošević's death, to which we now turn, the entire enterprise has come to appear tainted for Bosniaks.

## **IV. Milošević's Death and Termination of Trial: No Relief**

The Mothers of Srebrenica hold their ritual protests on the 11th of each month, but in March 2006, they linked their protest to another event: "Now Serbia has its 11th, maybe it is God's will that Milošević died on the 11th, but what joy it would have been for us to see him receiving his sentence for the evils he and his politics have done to Bosnia and particularly to Srebrenica."<sup>36</sup> Some Bosniak media—especially the more conservative papers such as *Dnevni Avaz*—also exhibited happiness that the "monster is dead."<sup>37</sup> One journalist talked of the sentiment some had of "unexplainable joy," especially among some of the Srebrenica widows.<sup>38</sup> But the predominant response of Bosniaks and Bosniak media to Milošević's death and the trial's termination was anger, disappointment, and regret.<sup>39</sup> The feeling of injustice was echoed throughout the pages of

papers and magazines, on television, in public cafes and streets,<sup>40</sup> and by all respondents interviewed for this chapter. Journalist Samir Sestan called Milošević's death "a grotesque and disgusting joke," adding that:

It happened so that the death of a criminal did not evoke any relief in the victim—not triumph and not euphoria, but completely unexpected and absurd pain. Now we can comfort ourselves with different stories and explanations that we are not mourning because of his death but because we did not get to the moment of the verdict and that we are upset that the crime will not be clearly and undoubtedly valorized ... it has brought us only pain and not relief.<sup>41</sup>

The leader of the *Bosanskohercegovačka patriotska stranka* (Bosnian Patriotic Party), Sefer Halilović, declared that he had expected the death of Milošević, and that it represented a huge blow to the Tribunal, but more specifically to the Prosecution.<sup>42</sup> The Council of Bosniak Intellectuals (*Vijeće Kongresa Bošnjačkih Intelektualaca*) concluded that Milošević was unfortunately able to evade a deserved punishment and regretted that he did not live to see the results of the projects he had created, such as an independent Kosovo.<sup>43</sup>

For most, the death was an occasion to repeat existing criticisms of the Tribunal that were believed to have contributed to the failure of the trial, particularly its length and the inefficient strategy of the Prosecution. For example, the Council of Bosniak Intellectuals specifically lamented the length and high cost of the trial—which it put at 200 million dollars—and questioned whether the Tribunal would change its procedures when it came to the (then only anticipated) *Karadžić* and *Mladić* trials.<sup>44</sup>

All interlocutors were disappointed that Milošević died before the trial was finished, but some added a point of skepticism about his death that connected to a theme of distrust and criticism of the international community. Subašić, for example, said she was dubious that Milošević had actually died, and believed it was a hoax orchestrated by the international community to confuse the victims; perhaps he is living nicely in Russia, she suggested.<sup>45</sup> A prominent Sarajevo journalist reported having heard doubts regarding Milošević's death from ordinary Bosniaks, including those with considerable education, and that these views were connected to claims that the international community had sought to protect Serbia and Milošević.<sup>46</sup> Similarly, some Serbs were also skeptical—though with a

political valence running in the opposite direction—and rumors swirled that Milošević had been poisoned.<sup>47</sup> Nevertheless, a diplomat reported that he never heard a serious Bosnian politician talk of a conspiracy theory regarding Milošević's death,<sup>48</sup> and these claims were not central in Bosnian media coverage of the death.

Although these conspiracy claims are interesting for their diverse perspectives, they say more about the lack of trust that some ordinary citizens—of different ethno-political identities—have toward the Tribunal and the countries that support it. Furthermore, attitudes toward Milošević's death provide some clues as to how Bosniaks understand the effects of the trial: The overwhelming sentiment of disappointment and anger that Milošević had not lived to the end of his trial comes through strongly in Bosniak's negative attitudes about the trial's legacy.

## **V. Effects and Implications: Divergence, Disappointment, and Persistent Nationalism**

Bosniaks were clearly disenchanted with the process and outcome of the *Milošević* trial, but apart from their perceptions, what have been the effects of the trial on Bosniaks more generally—on politics, inter-ethnic relationships, and Bosnia's future? We can identify effects related to three main areas: reconciliation, victims' recovery, and politics. Regarding reconciliation, there were divergent attitudes, with a minority of respondents arguing that the trial has had little to no effect as it merely reinforced each ethno-national groups' opposing perspective of the war, while others believed that the failed trial has worsened inter-ethnic accommodation because an opportunity for assessing blame and creating a common narrative was eclipsed, and nationalists could continue to deny past atrocities. Some also saw an indirect benefit to long-term reconciliation due to the vast evidence collected and revealed. Bosniaks also by and large agreed that their recovery or sense of justice has been harmed by the failed trial—their "victimhood" has not been alleviated. Last, there is profound disappointment in the continued nationalism and divisiveness marking the Bosnian political scene, including the loss of the



genocide case at the ICJ, which interlocutors see as connected to the *Milošević* trial.

## **A. Effects related to reconciliation and the creation of a common narrative**

There is no single Bosniak view on how the *Milošević* trial has affected inter-ethnic social relations and reconciliation. One common perspective holds that people's views about Milošević's role were already set and were not altered by the trial; another view, however, holds that the lack of a verdict has reinforced inter-ethnic tensions and nationalism because there is no official statement about Milošević's role and his guilt—as Bosniaks are confident would have been shown. Yet a third view suggests the unfinished trial could still contribute to long-term reconciliation as it has provided a great deal of evidence about the facts of the war and its crimes.

### **1. Little effect on reconciliation**

Though heterogeneous along many social and political spectra, Bosniaks are quite homogenous in their assessment of war guilt, in a way that suggests the limited utility of the international trial model. One of the central themes of Bosniak reactions to Milošević's death was the acknowledgement that “we” already know Milošević is guilty and that, because he would have been found guilty had the trial finished, the lack of an authoritative narrative is not, in itself, problematic: An official verdict is unnecessary and would unlikely change anyone's views.<sup>49</sup>

Dragan Golubovic of Sarajevo's Media Center stated that people generally did not follow the trial and that their opinions were quite stable regardless of the news reports from The Hague; Milošević's guilt was already presumed among Bosniaks and Croats—“No media in the Federation ever presented the slightest doubt about his guilt for the charges”<sup>50</sup>—while many Serbs saw Milošević as defending the Serbian people.<sup>51\*</sup> This belief was also reinforced and given legitimacy by evidence presented at other trials and the particularly shocking visual evidence, such as the *Škorpijoni* execution video. Furthermore, the Rule 98bis Decision<sup>52</sup> of June 2004, in which the Chamber found that the trial should continue as enough evidence existed that Milošević could be



convicted, reinforced Milosevic's guilt for some. Referring to the Decision as a "semi-verdict[,]” Eldin Hadžović argued that “When we say he was not convicted, that is not enough without a footnote that he would have been found guilty.”<sup>53†</sup> Several respondents also compared the terminated trial to the death of Hitler: Although he was never officially found guilty, “we all know he is.”<sup>54</sup> Thus, from this view, the trial was not particularly influential: Although it may not have changed attitudes, it has reinforced existing attitudes for some Bosniaks.

Divergent collective narratives about the past may be functional, because one's individual security and identity are often tied up with group security and identity.<sup>55</sup> As one anthropological study in Foča, Bosnia, a town heavily affected by war crimes, put it:

In such a polarized environment, it was clear that for most people, the ethno-political collective narratives made more sense and offered more security than “individual justice” and “shared truth” of the transitional justice paradigm. The ICTY's attempt to break up collective narratives was thus [in one respondent's words] transformed from a promise of peace to a threat of war.<sup>56</sup>

Although these perspectives illustrate the holistic nature of postwar transitional justice and the need to address the broader ideologies that led to specific atrocities, they are also examples of the “expectations gap.” Many Bosniaks have measured the Tribunal and the *Milošević* trial against standards of justice and reconciliation they cannot achieve. To some degree, Bosniaks' disappointment with international law as a solution is a function of their earlier, optimistic tendency to see international prosecution as strongly correlated with justice as they understood it.

## **2. Lack of closure on the past—a challenge to reconciliation**

By contrast, other interlocutors believed that the trial has actually worsened inter-ethnic tensions: Without a guilty verdict to give formal closure or establish an official record, creating inter-ethnic reconciliation and a common narrative become even more challenging. In political terms, the trial's termination has made it easier to deny genocide and to deploy nationalist rhetoric on all sides.

This view is, in a sense, the logical corollary of what Waters calls the “authoritative narrative theory”—the belief that trials create consequential

narratives: \* Because a guilty verdict would have supported and given authoritative legitimacy to Bosniak's (and all victims') arguments about their suffering, its absence necessarily sets that project back. A Srebrenica survivor, Kada Hotić, describes the potential of the trial and the impact of Milošević's death on that potential in just such terms: "Truth be told, it was not the goal of any victim to have defendants suffer, but simply to have them serve their sentences so this whole story becomes a part of the truth of everything that happened. With his death Milošević's role in Bosnia's tragedy would not become part of the judicial truth."<sup>57</sup> A political scientist at the University of Sarajevo, Nerzuk Ćurak, concurs on the importance of an authoritative judgment: "The indirect consequences [of the failed trial] primarily relate to an absence of fundamental proof of the character of the war ... This way everyone continues to promote his truth about the war."<sup>58</sup> And another respondent: "Right now the discourse over the war, its nature, beginning, ending is reduced to a matter of opinion, so my opinion is the same as anyone else's and I have nothing to back me up."<sup>59</sup>

The effect is not merely a frustration of Bosniaks' ability to prove, legally, what they know to be true, but also the license they believe it affords Serbs to deny that truth. Bosnian Army war veteran Enver Redžanović noted that the lack of a verdict is now being politically used by Serbs in Bosnia and Serbia (especially by elites), who emphasize that even the Tribunal could not prove his guilt, thus leading to a relativization of the past and the war.<sup>60</sup> Bosniak journalist Merima Husejnović agreed that the trial's termination has contributed to a lack of closure and reconciliation on the past: "Four years after his death, they [some Serbs] are still using every opportunity to mention him and the fact that there's not any official document that says he's guilty, even though we know he is."<sup>61</sup>

Interestingly, almost no interlocutors mentioned the genocide convictions and life sentences of Bosnian Serbs Vujadin Popović and Ljubiša Beara for their role at Srebrenica.<sup>62</sup> Although these convictions clearly establish responsibility and confirm the existence of a JCE related to the Srebrenica genocide, it appears that Bosniaks perceived the most senior actors—Milošević, and now Karadžić and Mladić—as more important to the confirmation of their truth, and thus to reconciliation.

### **3. Creating a record and a common narrative for the future**

Despite the disappointment and frustration with the *Milošević* trial, other interlocutors noted that the trial did produce volumes of evidence and testimony that have created a significant historical record of Milošević's actions and Serbia's role, which could play a role in long-term reconciliation and creating a common narrative. Although evidence is clearly not the same as an authoritative judgment by an international tribunal, as Waters argues, it does hold important weight. As Nielsen demonstrates, the information amassed by the Tribunal is invaluable to historians and researchers who will help produce future narratives. Had Milošević never been indicted, arrested, and tried, much would have been lost, forgotten, or erased from memory.

Almost all Bosniak respondents reported that the creation of a historical record of evidence should be seen as a significant beneficial effect of the trial, regardless of its outcome. For instance, Srebrenica survivor Kada Hotić, who lost her husband and brother, had great hopes that the ICTY would contribute to the acknowledgement of the truth, and believes that although this has not yet occurred, the ICTY is still significant because it has produced “the evidence and proof that will someday make [Bosnian Serbs] understand they lied to themselves.”<sup>63</sup> Others also believe that the *Milošević* trial has contributed to a larger discourse on the past in the region that has made it harder to live under the illusion of innocence.<sup>64</sup> For example, the screening during the trial—and on television in the region—of a video showing the *Škorpioni* paramilitary group executing a group of bound Bosniak men from Srebrenica was perceived as powerful and conclusive evidence of Serbian responsibility for crimes in Bosnia.<sup>65</sup> Graphic images, particularly of human rights abuses, can play an indispensable role in promoting knowledge, awareness, and potentially responsive action;<sup>66</sup> quite simply, the *Škorpioni* video thus made it harder to deny the crimes. Bieber's chapter shows how the video created important, albeit temporary, shifts in awareness within Serbia, and interlocutors see a similar effect in Bosnia.<sup>67</sup>

### **B. Effects related to victims' recovery**

Bosniaks demonstrate varying attitudes regarding the relationship between justice and individual healing or recovery—a relationship that is the



subject of debate within the study of transitional justice as well. There are many possible meanings of justice that might aid recovery for a given individual;<sup>68</sup> prosecution is only one way, and for some, it may not even be important. One research project noted the complexity of attitudes felt by a small group of Bosnian victims (primarily Bosniaks) who testified in war crimes trials:

[W]hile the vast majority of witnesses supported war crimes trials, there were far less certain about whether justice had been rendered in the cases in which they had testified. Tribunal justice, they said, was capricious, unpredictable, and inevitably incomplete. For the witnesses, full justice was far larger than criminal trials.<sup>69</sup>

This lack of closure may mean that the hope of recovery and “moving on”—often touted as a goal of transitional justice—may be out of reach,<sup>70</sup> particularly as victims feel that the politics of the past still exist in their everyday present lives. As a Bosniak psychologist noted:

It [the war] was not finished in terms of military defeat on either side, nor in terms of a defeat of certain politics. I’ve heard it so many times that closure one way or the other would have been very important. At this point, it is not so important for us to be right or vindicated, it is just [important] to put an end to it all and this way [without a verdict], there is no end. There is no legal, political, or military ending.<sup>71</sup>

Political scientist Ćurak agrees with these negative effects:

Bosniaks as a major victim of an aggressive invasion orchestrated by Belgrade on their country have been even further pushed into a greater victimhood [as a result of the failed trial] and many of them remain imprisoned in the past which prevents them from living a productive and forward looking life.<sup>72</sup>

Srebrenica survivor Subašić agrees that recovery has been difficult, and she believes that a guilty verdict would have made a difference: “With the trial, the verdict would have helped establish respect for victims and it would have shown that these trials are capable of bringing justice, and that would be a starting point to many things like improvement of multiethnic relationships and victims feeling a sense of justice being fulfilled.”<sup>73</sup> She added a point echoed in the transitional justice literature: that lack of justice and closure has made it difficult for many victims to return to their homes and communities.<sup>74</sup> Of course, obstacles to refugee return arise for



many, interrelated reasons, making it exceedingly difficult to pinpoint the independent effect of the *Milošević* trial or even the ICTY in general.\* Nevertheless, what is important here is that Bosniak respondents believe that, had the trial ended differently, the opportunities for refugee return would be better. The *Milošević* trial did not just have direct effects; it has also interacted with other events to influence Bosniaks' perceptions. Those perceptions—about the ability to return home and the feeling of having a home—are connected to victims' prospects for recovery and must be considered in any appraisal of inter-ethnic social relations.

The termination of the trial therefore means that for many victims, justice was not delivered; in this sense, and quite apart from any concrete effect a verdict might have had on reconciliation, the victims feel cheated. The negative effect here is derived from the termination of the trial—a contingent outcome, from which we should not necessarily conclude that trials as such are defective in this way. Criminal trials may still be an important tool for recovery as they legitimize and give public recognition to suffering. As one interlocutor noted:

To become again a functional person, to be able to escape the mental chains of victimization, I do believe that [justice] is important and necessary. Without this initial step [of justice being served], victims are paralyzed in the parallel universe of their own tragedy while the rest of the world goes by, being reduced to the role of a village idiot who pulls every passer-by by the sleeve to tell their story, and to plead for understanding and justice... [T]he sense of injustice and the related feelings of impotence are mentally debilitating to us.<sup>75</sup>

Still, by this same logic, the *Milošević* trial's potential for healing was, to a significant degree, bound up not only with the contingent chance of keeping Milošević alive to verdict, but of securing a conviction—and in particular for genocide, which was by no means certain. One study concluded that international courts such as the ICTY could, “under the right conditions, acknowledge the suffering of those most directly affected by war crimes and help them discharge their moral duty to testify on behalf of the dead,”<sup>76</sup> but the *Milošević* trial, sans verdict, did not fulfill those conditions.\*

## **C. Effects on Bosnia and its politics**

### **1. Reinforcing nationalism: Political uses of the trial**

Much as they believed a lack of closure has hindered reconciliation, many respondents believe the lack of a verdict has reinforced nationalist ideology and rhetoric among both Bosniak and Serb politicians, making it less likely that the crimes of the past will be directly confronted in the political process. Many of these critiques identify the individual focus of the trial process as problematic, because it fails to engage with the collective, national aspect of the crimes and the purposes for which they were committed.

There is no evidence that Bosnian Serb leaders directly used the trial to rally nationalists, but Ćurak sees an effect on politics: “[T]he worst consequence of Milošević’s early death was the continuation of secessionist politics in the RS; it is that kind of politics that makes a confrontation with the crimes avoidable.”<sup>77</sup> For Bosniaks, a verdict of genocide would have linked the creation of the RS to genocide, weakening its legitimacy and undermining secessionist claims. Ćurak emphasizes, “If Milošević had been sentenced, the political-legal capacity of RS would have been significantly relativized, regardless of the fact that all sentences in The Hague are of an individual character.”<sup>78</sup>

Mujkić, who has written extensively on nationalism in postwar Bosnia, concurs, arguing that Milošević’s death made it more likely that “justice will never prevail”: Nationalism is being fueled by the “revival of overall victimization, hate speech, denial of genocide.”<sup>79</sup> Like Ćurak, he criticizes the international community’s focus on individuals and legal process instead of the nationalist politics that continue to cripple inter-ethnic accommodation and the creation of a rights-protective democratic Bosnia:

[T]he major downfall of the general conception of the Hague Tribunal was that the expansionist nationalist ideology has not been tried. We deal with details, yet miss the overall context that made those details logical. The focus exclusively on individual actors without the greater picture is elusive and misleading.<sup>80</sup>

Bosniak leader and former member of the presidency Haris Silajdžić expressed a similar sentiment: “[I]t is ironic that these days coinciding with Milošević’s death, we have certain domestic and international

political powers that are trying to make sure that Milošević's project in Bosnia survives and the way they are trying to do that is through constitutional changes."<sup>81</sup> In short, "Milošević is dead and his project is alive."<sup>82</sup>

This view is not confined to Bosniak areas, as RS political analyst Tanja Topić noted: "What's missing here and never occurred was a confrontation with [Milošević's] politics and that is still missing to this day."<sup>83</sup> However, although many Bosniaks feel that the past crimes are not being sufficiently recognized (particularly by other Bosnians), there are many Bosnian Serbs, for example in the Podrinje region, who are frustrated that Bosniak losses, but not their own, are more recognized by the international community.<sup>84</sup>

Not a single Bosniak respondent or media source reviewed believed that denial of wartime atrocities by Bosnian Serbs has lessened; furthermore, they believe that partial moves by RS leaders toward acknowledging formal responsibility for wartime atrocities were compelled by outside actors.<sup>85</sup>

Thus, there was little genuine shift in RS policy or attitudes during the *Milošević* trial, and even if there was any change, this was likely not due to changed public attitudes or the trial.\* In fact, Damir Arnaut, a senior legal advisor to the Bosniak member of the BiH presidency, believes that it was the *Krstić* case—in which the Bosnian Serbs were found to have committed genocide in Srebrenica—that had the more significant impact on RS policy.<sup>86</sup>

## **2. "The deceased has been rewarded:"<sup>†</sup> Effects on the ICJ *Bosnian Genocide* case**

Many Bosniaks, particular political elites, have also argued that the failure to hold Serbia responsible for genocide in the *Bosnian Genocide* case before the ICJ was due in part to the failure to convict Milošević at the ICTY.<sup>87†</sup> For many, the failure to find Serbia guilty of genocide was even more significant and generated more interest than the end of the *Milošević* trial;<sup>§</sup> Bosniak leaders were so sure they would win that the verdict in February 2007 was a shock.<sup>88</sup> Bosniak elites were especially invested in this case as its outcome could have laid collective blame for genocide at



the feet of Serbia, just as they were very concerned during the *Milošević* trial about proving a connection between Belgrade and the RS.

The shock may have been genuine, but it also indicates the way in which the trial's outcome was used by political elites and survivors to further their own ethno-national goals. At the time of Milošević's death—when the ICJ verdict was still pending—political leaders made the Milošević-Serbia and ICTY-ICJ connection very clear: leader of the *Stranka demokratske akcije* (Democratic Action Party or SDA) Sulejman Tihić declared that “History will remember him as a first leader of a country charged with genocide at the ICJ.”<sup>89</sup>

Efforts to assimilate the fact of the *Milošević* trial's termination to the pending ICJ case began immediately after Milošević's death, and most of the concern was pragmatic, centering on access to and transparency of key evidence from Serbia, in particular the minutes of the VSO, which the ICTY had secured, but with a promise not to deliver them to the ICJ.<sup>90\*</sup> Bosnia requested that the ICJ demand these unedited documents, but the ICJ neither requested nor pressured Serbia for them.<sup>91</sup>

Once the ICJ judgment was issued, the Prosecution's earlier decision to accept a deal with Serbia regarding the confidentiality of the VSO documents itself became a focal point among Bosniaks—a way to explain the undesirable judgment and shore up the narrative of Milošević's and Serbia's guilt. Hajra Catić from the Mothers of Srebrenica made the causal link to the ICJ case directly: “If they had secured the [VSO] documents [from Belgrade], the whole verdict might have been different.”<sup>92</sup> One respondent believed that the media placed more importance on the ICJ case than ICTY cases, seeing a win at the World Court as having the potential to compensate for the Milošević “loss” at the ICTY—a “good opportunity to prove aggression upon Bosnia.”<sup>93</sup>

The interactions between the two trials in Bosniaks' political understanding track one of the core tensions in the ICL model and one of the factors that—as much transitional justice literature suggests—may account for the limited utility of trials in altering politics. Despite the fact that the ICTY's goal is to individualize rather than collectivize responsibility,<sup>94</sup> Bosniaks—and Serbs and Kosovars, as other chapters show—understood, accurately, that Milošević's notionally individual trial was intimately linked to the state-level proceedings at the ICJ and to



broader questions of collective responsibility. Nor was this impression limited to juridical calculations: Many Bosniaks still point to Serbs in the RS and Serbia as playing a key role in their suffering and negatively affecting the creation of a unified and democratic Bosnian state that serves all, perspectives that are also exacerbated by the observation that nationalism in Serbia and among Serbs has not waned as much as they would have expected and hoped for.

Thus, the *Bosnian Genocide* case was seen, through a political as much as a legal lens, as a way to hold Serbia legally and politically responsible for the war.<sup>95</sup> A verdict against Serbia would have confirmed the status of Bosnia as a victim state, which could have had important political and economic implications, such as reparations and international support.<sup>96</sup> Given the outcome, however, the case also served as a way for Serbs to see themselves as less to blame:

The Serbian public interpreted this [the ICJ case] as proof that Serbia was not involved in the war against Bosnia-Herzegovina. Following the ICJ's verdict, denial acquired a new dimension. The part of Serbian society that likes to call itself liberal, and that had previously appeared ready to discuss the Serbian state's responsibility for the war against Bosnia-Herzegovina, found in the ICJ's verdict an alibi for denying the fact of genocide. Denial is present most strongly in political discourse, in the media, in the sphere of law, and in the educational system.<sup>97</sup>

According to some academic Bosniak observers, the most important political outcome of a guilty verdict for Milošević or a judgment against Serbia would have been to delegitimize the RS as a product of genocide, lending credibility to the Bosniak nationalist argument that the RS should be dismantled in favor of a more unitary Bosnian state.<sup>98</sup> It is in this context that Bosniak views about Milošević's death, his trial's termination, and subsequent, retrospective gestures toward the VSO documents must be understood: not as the acceptance and internalization of the ICTY's preferred approach to individual responsibility, but as its instrumentalization for a project of political change driven by collective guilt.

## **VI. Law, Politics, and Reconciliation Reconsidered —Moving Forward from *Milošević***

Bosniak perspectives on the *Milošević* trial are complex, and must be understood not only within a legal, but also a broader sociopolitical framework, such as transitional justice offers. Scholars of transitional justice persuasively argue that international prosecutions are just one important means to achieve justice and reconciliation following wartime atrocities, but certainly are not enough, and in some cases, they may even do more harm than good. For victims especially, attaining a sense of justice and reconciliation with neighbors and other citizens requires broad social and political transformations that go far beyond the formally juridical: new political realities on the ground, ability to return home, protection of human rights, inclusive and nondiscriminatory education, economic improvement, and positive relations with one's neighbors—for example, a feeling of *komšilik*.\*

### **A. The reach of law and justice**

Milošević's arrest, transfer, and trial brought great satisfaction to Bosniaks who saw him as supremely responsible for the Bosnian war and its crimes; they also had high and positive expectations for what an international criminal trial—especially with its expected, inevitable guilty verdict—could achieve for inter-ethnic reconciliation, the creation of a common Bosnian narrative, the drowning out of genocide denial, their own personal and group recovery, and the more abstract justice so many people say they are seeking.

Although these hopes and expectations may have been misplaced or exaggerated, they have colored the current perspective Bosniaks have on the legacy and effects of the *Milošević* trial. Two divergent responses stand out. On the one hand, many Bosniaks do not see much effect as the outcomes they expected have not been realized: reconciliation is still a goal more than a reality; a common Bosnian identity and narrative is lacking; genocide denial, even at the elite level, still exists; and many say that recovery from past trauma is either impossible or is still only a distant hope. When one adds methodological complexities of finding causal

relationships between a trial and sociopolitical change, the view that the trial had little influence becomes even more understandable.

On the other hand, those respondents who believed or perceived that the trial did have an effect—about 90 percent—were overwhelmingly likely to see those effects as negative, in personal, social, and political terms. For many of these respondents, these negative effects were contingent, having arisen from the trial's termination; they believed more positive outcomes would have come from a completed trial—with, of course, a guilty verdict, especially on the genocide charge. Given the actual outcome, these respondents perceived that the terminated trial has reinforced, rather than caused, competing narratives on the past, challenges to reconciliation, nationalist politics, and overall a lack of closure. For instance, all Bosniak respondents asserted that Serbs have not been forced to come to terms with what they did or supported during the war, and some of these respondents believe the termination of the trial worsened this state of affairs.

Despite this pervasive cynicism and pessimism, Bosniaks also cited some indirect beneficial effects of the trial. Despite the lack of a verdict, the massive amount of evidence and testimony resulting from the four-year trial is and will be invaluable toward creating a common narrative; some Bosniaks argued that this has already made it a little harder to deny genocide.

In general, Bosniak interlocutors appeared more focused on the symbolic meaning that a genocide verdict would have had, quite apart from any direct influences the trial has or has not had on them, other citizens, or the state itself. It is almost as if pondering effects and implications is an academic question with less resonance for respondents, compared to a sentiment that might sound something like this: Milošević should have been held officially and legally responsible, even if this would not have had any tangible difference in my life or the life of our fractured state. To the degree this is accurate, it is an appeal to pure justice.

## **B. The staying power of politics**

Far from confirming a positivist understanding of law, the views of Bosniaks illustrate how law is fundamentally interconnected with and influenced by politics and society—law occurs in a political context, not

separate from it. Bosniaks (and many citizens of the region) saw the Tribunal and the *Milošević* trial as an institution and an event with the potential to influence Bosnian and regional politics. For example, many respondents saw the Tribunal's rules and procedures as benefiting Milošević politically by giving him a platform; they believed deals made with Serbia to keep VSO documents confidential had a negative impact on Bosnia's genocide case at the ICJ where the loss was seen as politically consequential, and some interpret the lack of a verdict in the trial as contributing to the legitimacy of the RS and nationalist politics in Bosnia.

Additionally, reactions to the trial suggest the usefulness of a constructivist approach to law that sees the Tribunal as an important actor in processes of norm socialization and democratization. The Tribunal has been instrumental in creating more positive attitudes toward accountability and the need for trials in general,<sup>99</sup> but the ICTY should also be seen as playing a supporting and reinforcing role among a network of international and domestic actors whose goals are to encourage greater reconciliation, democratization, and Europeanization within Bosnia.<sup>100</sup> In terms of its impact on Bosnia, the "ICTY's main contribution seems to have been its utility as a political lever, rather than its utility as a tool of post-conflict reconciliation[.]"<sup>101</sup> Even if individual trials have only limited influence—or their influence is hard to measure—the Tribunal as a whole can and should be seen as contributing to a broader process of norm socialization and institutionalizing the rule of law in Bosnia. Even though Milošević's trial did not finish, "[it was] proof that he was reachable, that justice can be reached, and there is a positive feeling about the fact that he was in jail for so long."<sup>102</sup> In short, even a terminated trial is support for the rule of law in society.\*

In terms of Bosnia's sociopolitical realities, Bosniaks are deeply pessimistic about the current state of their politics and social relations, and they exhibit a common tendency to posit linear and causal connections among the past, present, and future—seeing, for example, that Serbian nationalist politics and crimes of the past did not end with the war, nor have they been ameliorated by Dayton or trials at the ICTY; nor, it seems, is there any expectation that they will improve.<sup>†</sup> In light of all this, it is difficult for Bosniak respondents to see these sociopolitical realities as *not* connected to Slobodan Milošević, whom they view as the key creator of



Serbian nationalism, even if the evidence for a direct connection between the trial and the current state of politics is tenuous. The terminated *Milošević* trial—together with *Bosnian Genocide*—was therefore seen as a missed political and psychological opportunity to hold not only an individual but also a nation accountable for years of suffering.

Nevertheless, for Bosniaks, an aborted trial was better than no trial at all. Some victims have been comforted by the fact that the last five years of Milošević's life were spent in a detention cell and not as a political leader or in hiding. Many observers of contemporary Bosnia agree that it will take a holistic and multifaceted approach to achieve greater inter-ethnic reconciliation and justice, but the lack of violence, the proliferation of civil society organizations working toward these goals, and the numerous war criminals currently in prison or on trial—including Karadžić and Mladić, the two leading figures whom, even more than Milošević, Bosniaks associate with their victimization—are evidence of some progress.\*

## The Hague Front in the Homeland War

Narratives of the *Milošević* Trial in Croatia

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*Evaluative studies of international trials have generated widely divergent conclusions as to the impact of trial processes on post-conflict societies. Although these divergent conclusions reflect significant disagreements over how to measure impact, some measures are possible. Swimelar's chapter illustrates the Milošević trial's disparate effects upon a wide range of constituencies in Bosnia—disappointment, reinforcement of narratives about the war, and a perception that more remains to be done to promote transitional justice. A similar finding is evident in Croatia, where the trial was deployed, and coopted, by national elites to reinforce narratives about the justice of Croatia's Homeland War. The Milošević trial was initially welcomed as an opportunity to gain international affirmation of dominant domestic narratives of the 1991–1995 war. However, despite the revelation of important evidence, which pointed to Belgrade's wartime leadership of Croatian Serb rebels in the Republika Srpska Krajina, in Croatia the Milošević trial ultimately left a widespread sense of disappointment with both that trial's process and other, related trials concerning crimes committed during the 1991–1995 war.*

There is a growing body of transitional justice literature that advances competing causal claims on the extent to which international war crimes trials resonate with post-conflict audiences.<sup>1</sup> As Swimelar's chapter concisely illustrates, scholars have advanced numerous claims about the purported impact of international trials, which rely upon a wide range of indicators such as public opinion, media reporting, inter-ethnic relations, reconciliation, or democratization.<sup>2</sup> Not surprisingly, given the multiple means through which impact can be measured, widely divergent and at times contradictory findings have emerged from these studies.<sup>3</sup> In spite of the inherent difficulties in mapping causal links between trial processes and societal impacts, there are two broad and competing arguments in transitional justice literature that we should have in mind when evaluating the domestic effects of international justice. The first sees trials as a prerequisite to post-conflict or post-authoritarian peace;<sup>\*</sup> the second cautions that an exclusive focus on legal process may leave international justice vulnerable to being "hijacked" by local elites who use trials to reinforce nationalist narratives.<sup>4</sup> This chapter provides empirical support for the latter argument, showing how Croatian political and media elites filtered the *Milošević* trial, along with other trials related to crimes in Croatia, through dominant narratives of the recent past that constructed Zagreb's role in the wars of the Yugoslav dissolution as exclusively defensive and liberatory.

It is within the context of these transitional justice debates that this chapter focuses on evolving Croat perceptions of and reactions to Milošević's trial and death. Despite being "hijacked," the *Milošević* trial created an important record of the war in Croatia that will complement subsequent trials and ultimately post-ICTY transitional justice mechanisms in Croatia such as the regional truth commission initiative RECOM.<sup>†</sup> Most particularly, the *Milošević* trial has shaped public debates on the recent past.<sup>‡</sup> Croatia proves instructive as a core case study—and a useful counterpart to Swimelar's chapter—because, as in Bosnia, public reaction to Milošević's trial in the aftermath of his death has been marked by deep disappointment.<sup>5</sup> Indeed, the initial optimism articulated by political elites and the local media that the *Milošević* trial would reinforce dominant Croatian narratives of the Homeland War<sup>§</sup> rapidly diminished as the prolonged trial process found itself overshadowed by tensions between

the ICTY and Croatia over the transfer of Croat war crimes suspects. Later, disappointment with the *Mrkšić* et al. trial and appeals judgments,<sup>6</sup> which in the absence of a *Milošević* judgment constituted an important opportunity for the ICTY to hold individuals accountable for the 1991 Ovčara farm massacre near Vukovar, further undermined this optimistic view.<sup>7</sup> Much as in Bosnia, despite an overall sense of disappointment with the *Milošević* trial, the creation of copious amounts of evidence that illuminates Belgrade's role in fomenting violent conflict in Croatia and Bosnia is perhaps the trial's most valuable legacy for the region.<sup>8\*</sup> Nevertheless, the informational resource generated by the ICTY has also been subject to selective reading on the part of local elites who have attempted to use courtroom developments to reinforce their own preferred narratives of the past.

In spite of the political salience of war crimes prosecutions in Croatia, there remains a lacuna of scholarship on the *Milošević* trial's reception among Croats. This gap in scholarship reflects the fact that most literature on the ICTY and Croatia examines the legacy of the Tribunal through the lens of prosecutions against Croatian nationals.<sup>9</sup> In addition, efforts to examine the impact and legacy of the *Milošević* trial have largely focused on the trial's resonance in Serbia.<sup>10</sup> The relative absence of evaluative studies of the trial's impact in Croatia is surprising given the fact that it was in Croatia that Milošević first planned and executed a JCE to commit crimes against humanity during the autumn of 1991.<sup>†</sup> Furthermore, of the 66 counts Milošević faced at trial, 32 related to the *Croatia* indictment.<sup>11</sup>

## **I. The Context: War, Memory, and the Tribunal**

Croatia's October 2000 parliamentary Declaration on the Homeland War described the 1991–95 war as having been "... a legal, legitimate, defensive, liberatory" armed conflict in which Croatia "defended its territory from Greater Serbian aggression within its internationally recognized borders."<sup>12</sup> The Declaration's characterization of the war in Croatia as both defensive and legitimate established Zagreb's official narrative of the conflict as state policy, and its principal claim was that the



war in Croatia was not a civil conflict between Croatian Serbs and Croats but rather was an aggressive war of conquest waged by Milošević's government in Belgrade. Although this official narrative allows for the acceptance of isolated crimes perpetrated by Croats during the war, overall the narrative emphasizes that Croatia's war effort was a just response to an act of aggression.<sup>‡</sup> Prior to the Declaration, the Croatian parliament adopted a resolution in 1999 declaring that "given the unquestionable legitimacy of these counter-terrorist actions [Operations Flash and Storm] on our own state territory, the Croatian Sabor considers possible individual criminal acts carried out in their respect to be exclusively [under the jurisdiction of] the Croatian courts."<sup>13</sup> Zagreb's *jus ad bellum* justification of the Homeland War,<sup>\*</sup> espoused by the wartime governing *Hrvatska demokratska zajednica* (Croatian Democratic Union or HDZ) at the outbreak of armed conflict, has remained dominant throughout the 1990s and first decade of the 2000s;<sup>†</sup> however, recently it became a source of tension between the HDZ-led government under former prime minister Jadranka Kosor and Croatian President Ivo Josipović.<sup>‡</sup>

Zagreb has viewed the Tribunal, since its establishment, as both a potential challenger to nationalist wartime narratives and a forum in which the Tuđman regime's preferred narratives could be reaffirmed. In total, the ICTY issued 23 indictments for crimes committed in Croatia between 1991 and 1995.<sup>§</sup> Of these, 17 accused individuals of crimes allegedly committed by Serb forces, while six indictments accused individuals of crimes allegedly committed by Croat forces.<sup>14</sup> Despite this clear numerical preponderance—over two-thirds of indictments brought against Serbs—Croatian elites have consistently perceived the ICTY as having an anti-Croat prosecutorial bias.<sup>15</sup> This perception in turn reflects a belief that the Tribunal indictments against Croats, taken together, constitute an attempt to criminalize Croatia's war for independence and challenge the *jus ad bellum* narrative of the Homeland War. Croatian war crimes suspects and their supporters believed that, as victors of the Homeland War, Croats should be entitled to the implicit immunities of victor's justice.<sup>¶</sup> As we will see, the *Milošević* trial, its aftermath, and the Vukovar judgments in *Mrkšić* were viewed as further evidence of an anti-Croat bias at the ICTY.

Finally, before turning to the *Milošević* trial and its legacy in Croatia, we should note that the memorialization of the war in Croatia has centered on two key events: the 1991 siege of Vukovar and Operation *Oluja* (Storm) in 1995. For Croats, the Eastern Slavonian city of Vukovar came to symbolize Croatian victimhood, whereas Operation Storm symbolized Croatia's military triumph. At Vukovar, the Ovčara massacre played a central role: Not only had the city been decimated by the JNA, but prisoners of war from the *Hrvatska vojska* (Croatian Army or HV) and patients at the Vukovar hospital were transferred to the Ovčara farm by the JNA and Serb paramilitaries for execution.<sup>16</sup> Indeed, long before Ovčara's inclusion in the *Milošević* indictment, the ICTY had issued indictments against three mid-level JNA officers, Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin, who were alleged to have participated in the Ovčara massacre.<sup>17</sup> The subsequent trial of the Vukovar Three, as the three defendants became known, and controversial judgments a decade later would generate a strong negative reaction within Croatia to the ICTY.<sup>18</sup>

## **II. An Imperfect Attorney for Croatia: *Milošević* and the Krajina Serb Leadership**

It was in the context of these highly charged debates over Croatia's role in the war that the ICTY certified the *Croatia* indictment against Milošević in October 2001. Although the *Croatia* indictment was not issued until after Milošević's transfer, the presence of the former Serbian and Yugoslav president in ICTY custody was already highly symbolic in a country whose own recently deceased head of state, Tuđman, had been the subject of Prosecution investigations prior to his death in December 1999.\*

In the *Croatia* indictment Milošević was indicted for participation in a JCE that sought to achieve:

... the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state... <sup>19†</sup>

The *Croatia* indictment named 16 individuals as co-participants in the JCE; some of these were under indictment separately for related crimes, but some senior JNA commanders, including Veljko Kadijević and Blagoje Adžić, were never indicted.<sup>‡</sup> Nevertheless, the *Croatia* indictment was initially welcomed by Croatian political elites and the local media.<sup>20</sup>

In her opening statement at the trial, Chief Prosecutor Del Ponte pointed to Belgrade and the JNA leadership's attempt to establish the *Republika Srpska Krajina* (or RSK) and Belgrade's role in provoking violent conflict between Croatian police forces and the JNA in 1991.<sup>§</sup> From the opening statement and the *Croatia* Indictment, it is evident Del Ponte chose not to indict other key participants in the JCE so as to focus prosecutorial efforts on Milošević; for example, Kadijević and Borisav Jović appear frequently in Del Ponte's statement.<sup>21</sup> In retrospect, Milošević's death and the failure to indict members of the 1991 JNA senior leadership left an accountability gap for some of the most serious and symbolically important crimes committed at the outbreak of the war in Croatia.\*

With the JNA leadership unindicted, the *Milošević* trial took on increased importance for Zagreb in terms of reinforcing its *jus ad bellum* narrative of the Homeland War and strengthening Croatia's genocide case against Serbia before the ICJ.<sup>†</sup> Indeed, in the preliminary statement in its ICJ application, Croatia foreshadowed language later used in Del Ponte's opening statement:

By directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of the Republic of Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia, the Federal Republic of Yugoslavia is liable for the "ethnic cleansing" of Croatian citizens from these areas ...<sup>22</sup>

Initially the trial seemed to start positively if measured in terms of its reception among media and political elites in Croatia. One particular witness' testimony was widely reported: In December 2002, Milan Babić, a former leading figure in the RSK, took the witness stand against Milošević and provided testimony that illuminated Belgrade's involvement in provoking violent conflict in Croatia; Babić would later be described by Emir Suljagić as "perhaps the single most important witness in the trial."<sup>23</sup> In Croatia, Babić's testimony confirmed what the Croatian



public already generally believed: Belgrade supported Croatian Serb rebel leaders both materially and financially at the outbreak of war in 1991.<sup>24</sup> In the Croatian daily *Jutarnji list*, journalist Davor Butković reflected upon the importance of Babić's testimony for Croatia: "The Hague Tribunal has really become a strong and credible attorney for the Republic of Croatia."<sup>25</sup> The Croatian pro-government daily *Vjesnik* directly channeled Babić's courtroom testimony:

Mr. Milošević, in 1991, you waged a horrific war. You dragged the Serbian people into that war. You did not protect the Serbian people. You brought shame upon the Serbian people. You brought misfortune on the Croatian people, the Muslim people, and ultimately the Serbian people.<sup>26</sup>

Through testimony such as Babić's, the *Milošević* trial provided a significant amount of documentary evidence reconstructing Milošević's control over the Krajina Serb leadership; however, in the absence of a judgment and in the context of controversial post-*Milošević* judgments for crimes contained within the *Croatia* indictment, the resonance of that testimony—beyond media reports about it at the time—remains limited.\*

### III. The Uses of *Milošević*: The ICJ, Vukovar, and Gotovina

Although the absence of a judgment in the *Milošević* case limited the domestic resonance of evidence produced during the trial, ICTY processes related to crimes in Croatia were always understood in terms of whether they served to consolidate dominant narratives about the recent past that emphasized Belgrade's involvement in the war in Croatia and Croat victim-hood. Moreover, just as *Milošević* had been, for some, a proxy JNA trial, now the evidence from *Milošević* was considered in light of other, pressing cases that affected Croatian narratives. In this sense, even a terminated trial had its uses.

As we have already seen, the *Milošević* trial produced an enormous body of evidence that directly implicated Belgrade in planning and carrying out the war in Croatia; however, within a year and a half of Milošević's death, disagreements within the Prosecution spilled out into



the Croatian press, where they were deployed in domestic political disputes. In a letter to *Jutarnji list*, former prosecutor Geoffrey Nice alleged the Prosecution—Del Ponte—had played a role in concealing documents from the ICJ that could have demonstrated Belgrade’s wartime control over the VRS and the SVK.<sup>27</sup> Given that both Bosnia and Croatia had filed suit against Serbia for Belgrade’s violation of the Genocide Convention, documentary evidence of Belgrade’s direct role in waging war within their respective states would have been critical not only for proving individual criminal responsibility but for establishing state responsibility as well. Thus, Nice’s allegation that the Tribunal assisted Belgrade to “conceal evidence of Yugoslavia’s [Belgrade’s] involvement in the wars in Bosnia and Croatia from the ICJ and from its own citizens”<sup>28</sup> proved domestically explosive within Croatia and triggered an immediate response from Prime Minister Ivo Sanader and President Stjepan Mesić, who sought to raise the issue at the United Nations.<sup>†</sup> In response to Nice’s claims, Mate Granić, Tuđman’s former foreign minister, evoked Milošević’s death, noting “the Croatian government should not remain silent about the fact the [ICTY] has not fulfilled its mandate...most of all Milošević was not convicted which was a failure of the Prosecution in particular...”<sup>29</sup>

Further complicating the ICTY’s relationship with Croatia, the September 2007 judgments against the Vukovar Three—which, although symbolically important, addressed only the Ovčara massacre and not the siege and destruction of Vukovar itself—provoked a strong reaction from both victims groups and political elites in Croatia. When the Trial Chamber sentenced Mrkšić to 20 years and Šljivančanin to just five years<sup>30</sup>—and acquitted Radić—the verdict was described by Franciscan monk Zlatko Spejar as “scandalous” and having “overturned justice[.]”<sup>31</sup> Moreover, the Trial Chamber’s judgment was also seen as harming Croatia’s ICJ case against Serbia. As a source close to the Croatian ICJ legal team stated:

Another thing is that the judges concluded the crime was committed by territorial defence members (local Croatian Serbs) and not the Yugoslav army, which is similar to a finding in a judgment in Bosnia’s own genocide case against Serbia, which established that genocide was committed by Bosnian Serb forces, and not the forces from Serbia, in July 1995, when more than 8,000 Muslim men and boys were killed.<sup>32</sup>

Public reaction to Šljivančanin's final appeals judgment in December 2010, which fixed his sentence at 10 years,<sup>\*</sup> generated perhaps even greater public shock than the initial verdict.<sup>†</sup> Croatian state television extensively covered domestic reactions to Šljivančanin's shortened sentence. These reactions ranged from expressions of anger and disappointment to conspiratorial hints that the judgment was political. Croatia's state broadcaster HRT quoted Branko Borković, the last Croat commanding officer at Vukovar in 1991, stating that the "directly political judgment of The Hague court constitutes part of [international] pressure being applied on the Republic of Croatia[.]"<sup>33</sup> From the perspective of many in the Croatian elite, there had been no verdict in the one case that covered the mastermind of aggression against their state, and only partial, minimal punishment in the one case that focused on their victimhood.

In addition to Milošević's death complicating efforts to secure accountability for Vukovar, the *Milošević* trial's legacy is also colored by ongoing debates centered around the memory of the Homeland War. Milošević's transfer to the ICTY coincided with an indictment that would prove the most contentious of all for Zagreb. Ante Gotovina, a lieutenant general in the HV and one of the architects of Operation Storm and Operation Mistral in Bosnia, was indicted in June 2001.<sup>34</sup> However, Gotovina went into hiding and was only transferred to the ICTY following his December 2005 arrest in Spain. The *Gotovina* trial has been the most closely followed and widely reported ICTY trial process in Croatia.<sup>35</sup> Indeed, not only was Gotovina's initial appearance before the Trial Chamber in 2005 broadcast in full on Croatian TV,<sup>36</sup> but so were the closing arguments in 2010.

In Croatia, the *Gotovina* trial was widely perceived as passing judgment on the Homeland War itself.<sup>37</sup> As we have seen, because political elites often employ *jus ad bellum* defenses to allegations of *jus in bello* offenses, indictments—although they technically focus on discrete criminal acts—are viewed as challenging Zagreb's just war narrative. Proponents of that narrative have portrayed the ICTY as lacking the moral authority to pronounce judgment in any case related to Zagreb's conduct during the war. Gotovina's chief defense attorney, Luka Mišetić, captured this sentiment in a comment to the Croatian media:

Who is [ICTY Chief Prosecutor Serge Brammertz] to lecture Croats about what they need to know about what happened to them during the war? I am sure that two and a half years ago he couldn't find Knin on a map, and I am not sure that he could do that today.<sup>38</sup>

On 15 April 2011, three national television channels broadcast the reading of the *Gotovina* Trial Chamber's much-anticipated verdict.<sup>\*</sup> The verdict, which saw Gotovina and Mladen Markač, former Assistant Minister of Interior and commander of the *Specijalna policija* (Special Police), convicted of war crimes and crimes against humanity,<sup>39</sup> provoked a bitter response from Croatian political elites and the media.<sup>40</sup> Croatian Prime Minister Jadranka Kosor even decried the verdict as unacceptable.<sup>41</sup>

The *Gotovina* Trial Chamber's judgment finding that a JCE had been perpetrated with the purpose of permanently removing the Serb population from the Krajina region was perceived in Zagreb as a direct challenge to the official narrative of the Homeland War that was established in the parliamentary Declaration on the Homeland War (2000), and had been affirmed by the Constitutional Court in 2002.<sup>42</sup> Even though Judge Orić made explicit the judgment did not make a pronouncement on "the lawfulness of resorting to or conducting war as such,"<sup>43</sup> political entrepreneurs in Croatia chose to construct the judgment as having criminalized the state itself. The leader of the Split branch of the nationalist Croatian Party of Rights, Hrvoje Tomasović, declared that "from this judgment it is clear that all of Croatia was founded upon a joint criminal enterprise. Based on this our state is not at all legitimate. Milošević would not have given Gotovina 24 years."<sup>44</sup>

Tomasović's statement also captured a popular sentiment in the aftermath of the *Gotovina* trial judgment, which perceived the ICTY as pursuing an anti-Croat bias in its indictments, judgments, and sentencing. In the absence of a judgment on the *Croatia* indictment from the *Milošević* trial, and given widespread disappointment with the outcome of the Vukovar Three case, such views gained increased popular currency in Croatia in the years following Milošević's death.

However, in November 2012, this sentiment dissipated in response to the Appeals Chamber's acquittal of Gotovina and Markač. The Appeals Chamber judgment reversed the trial chamber's earlier finding that the two generals had taken part in a JCE.<sup>45</sup> Gotovina and Markač's return to



Croatia was marked by widespread celebrations, speeches delivered by the generals on Zagreb's main square, and receptions with senior state officials, all of which reinforced a perception that the Appeals Chamber judgment affirmed Croatia's *jus ad bellum* narrative of the Homeland War.<sup>46</sup>

## IV. Evaluating International Justice: The Legacy of *Milošević* in Croatia

The *Milošević* trial will likely remain a landmark event in shaping the legacy of the ICTY in both Croatia and Bosnia. Unfortunately, despite the meticulous documentation of Belgrade's role in the war in Croatia and spectacular courtroom testimony by Babić, a combination of three factors means that legacy, in Croatia, will be largely negative: Milošević's death, an outcome in the Vukovar Three trial that was widely viewed as unsatisfactory, and the contentious *Gotovina* judgment left many in Croatia with a sense of deep disappointment in international criminal justice.

In Croatia, an elite preoccupation with maintaining an official narrative of the recent past has resulted in ICTY trial processes, in particular the *Milošević* trial, being filtered through political and media elites who sought to use international criminal justice to reinforce two fundamental tenets of this official narrative—Serbian aggression and Croat victimhood. It was within this context that the *Croatia* indictment was initially welcomed in Zagreb. However, subsequent developments generated a growing sense of hostility toward a perceived anti-Croat bias at the ICTY.

Perhaps one additional legacy of the tumultuous relationship between Croatia and the ICTY is a lingering sense of hostility between veterans' organizations and transitional justice practitioners. In particular, this is a result of a general perception among veterans' groups that transitional justice efforts are aimed at criminalizing their members' involvement in armed conflict.<sup>47</sup> As a result veterans' organizations remain cautious of engagement with transitional justice initiatives, including the RECOM initiative for a regional truth commission.<sup>48</sup>



Nevertheless, despite trial processes being “hijacked” in the short term to reinforce preferred narratives about the past, in the long term the historic record established by the ICTY during the *Milošević* trial will provide an important glimpse into the collapse of the SFRY and the outbreak of violent conflict in Croatia. As such, post-ICTY transitional justice initiatives in the former Yugoslavia, such as RECOM, will benefit from what have been seen within the region as highly problematic trial processes.

## Another Report on the Banality of Evil

The Cultural Politics of the *Milošević* Trial in Kosovo

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*The Milošević trial not only offered competing ways to read discourses of victimization and truth-telling narratives; it was also about the politics of responsibility, justice, and historical knowledge. But as a reconciliation and healing project embedded in an idealistic system of transitional justice, it proved a failure in Kosovo, for it did not create any meaningful venue for political rapprochement between Serbs and Albanians. Instead of facilitating the process of coming to terms with the past, the trial—as a spectacle—only contributed to the perpetuation of a state of denial in Serbia about responsibility for atrocities, expulsion, forced displacement, rapes, looting, and dispossessions in the wars of the 1990s. Indeed, what the trial showed was the success of Milošević’s main tactic: de-emphasizing the suffering of the victims of his rule and refusing—on behalf of Serbs—to take any blame at the political and societal levels. The trial of Milošević was itself an act of transgression of history: It perpetuated a prevailing sense of victimization in Serb society and deferred any movement toward transitional justice through retributive and restorative means.*

## Introduction

The *Milošević* trial not only offered competing ways to read discourses of victimization and truth-telling narratives in the former Yugoslavia; it was also about the politics of responsibility, justice, and historical knowledge. As an example of postbellum justice, the case promised to be the most important one facing the ICTY. It was also supposed to be a vehicle for an idealized system of transitional justice—reflecting the ICTY’s broader goals, the trial constituted a moral and historical lesson: to deter further mass violence in the former Yugoslavia, to develop an historical record that would enable warring societies to come to terms with the past, and, finally, to serve as a warning to warmongers elsewhere in the world.<sup>1</sup>

This chapter explores the reception and effects of the *Milošević* trial in Kosovo. It recounts the material and symbolic suffering, loss, and shattered lives stemming from the ultranationalist ideology and policies pursued by Milošević in the 1990s. As a narrative, it deals with the political economy of Kosovar victimhood and of the cultural politics of its population’s emotions.\* It thus gives space to voices from below—to the victims of Milošević’s state-sponsored terrorism and the ways they confronted him at the ICTY.† It analyzes the Albanian and Serb dialectic as part of a discourse on ethnic relations and within the context of the trial’s impact on the Albanian psyche in Kosovo and on the body politic in Serbia.

The chapter makes three specific points. First, the trial did not create any meaningful venue for political rapprochement between Serbs and Albanians. The proceedings—and Milošević’s physical death before their conclusion—not only had negative effects on reconciliation processes but also failed to render justice for the victims. As a spectacle, the trial contributed to the perpetuation of a state of denial in Serbia about responsibility for atrocities, expulsion, forced displacement, rapes, looting, and dispossessions in the wars of the 1990s. Second, the trial showed the success of Milošević’s main defense tactic, which systematically minimized the suffering experienced by the victims of his rule and reinforced Serb refusal to take any blame at the political and societal levels. Third, the trial was itself an act of transgression against history: It perpetuated a prevalent sense of victimization in Serb society

and deferred any movement toward transitional justice through retributive or restorative means.

## I. Reaction to the *Milošević* Trial in Kosovo

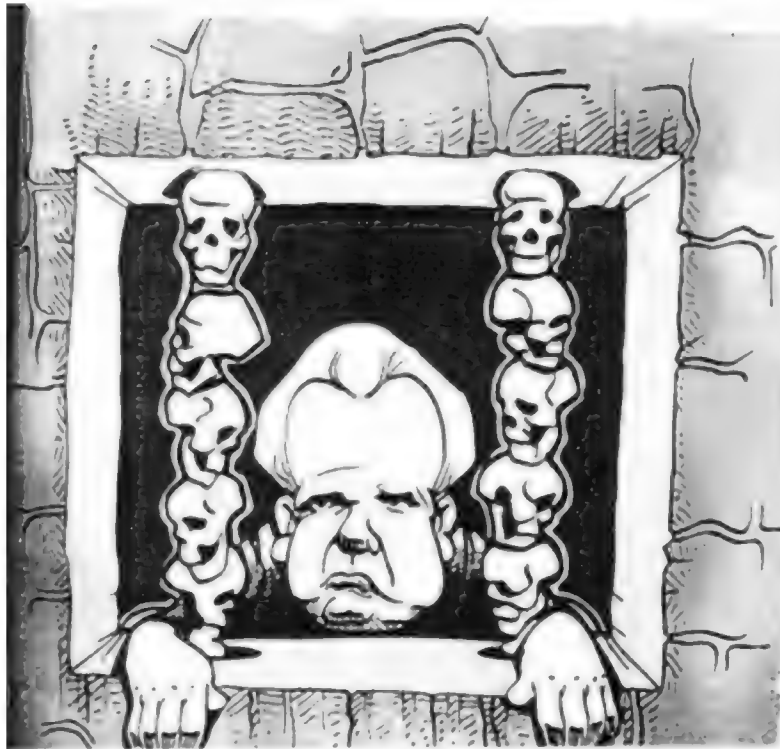
Milošević's trial began in 2002, but, of course, Kosovar Albanians had had a far longer experience of the man. It is commonly noted that the Yugoslav crisis of dissolution had its origins in Kosovo. The devolution of power in the late Titoist era and then the end of 50 years of ideological division between East and West raised expectations in Yugoslavia for greater political freedom, liberties, and equal citizenship; for Kosovars, it was principally Milošević who shattered these hopes by choosing the politics of violence, war, and ethnic cleansing. The Milošević era in Kosovo, spanning the 10-year period from 1989–1999, constituted a decade of direct and indirect means of ethnic cleansing: abolition of Kosovo's autonomy; banning the use of Albanian as an official language and in the media;<sup>\*</sup> expulsion of Albanians from jobs and homes; barring access to education; and imprisonment of thousands of Albanians.<sup>†</sup> This campaign entered an even more brutal phase during the counter-insurgency campaign against the *Ushtria Çlirimtare e Kosovës* or Kosovo Liberation Army (UÇK/KLA) in 1998, with murders, rapes, deportation, burning of homes, and destruction of cultural sites.<sup>‡</sup> It reached its culmination during NATO's bombing campaign, when 850,000 Kosovar Albanians were deported by Serbian military and paramilitary forces—the biggest population displacement in Europe since the Second World War.<sup>2</sup>

Any accounting of the terror campaign waged by Milošević's regime in Kosovo serves the purpose of reviving memories of the power he had over Kosovar Albanians and the crimes committed in his name. It necessarily invokes the power of memory as a strategy for achieving justice. The defendant's own performance is crucial here, and Hannah Arendt's comment on the trial of Adolf Eichmann applies to Milošević as well: "[T]he focus of every trial is upon the person of the defendant, a man of flesh and blood with an individual history, with an always unique set of qualities, peculiarities, behavior patterns, and circumstances."<sup>3</sup>



When Milošević appeared before the ICTY in February 2002 to begin his trial on charges for crimes in Kosovo, the live broadcast was the first venue that allowed Kosovar Albanians to confront the man who used all his power to victimize them. The Albanian population in Kosovo, and in particular victims of the war, were glued to the television screens—watching the trial in pain and grief, at home, in cafés, train stations, schools, wherever they happened to be when the proceedings commenced. Kosovar Albanians did not perceive themselves as merely passive recipients of images; symbolically, those watching the trial were engaged in confronting Milošević as part of a virtual reality show. On that cold day in February, Milošević looked just like any ordinary Serbian communist politician of the late 1980s: With his gray hair and middling stature, he kept his head high, but also appeared somewhat nervous. He faced the ICTY in silence. But to many Kosovar Albanians, this ordinary surface hid an inner self, whose brutality was directed against all those who challenged his quest for power, control, and domination.

On that first day of the trial, the media were heralding the end of Milošević and his era—a moment of closure to the history of wars and ethnic conflict in the former Yugoslavia. The print media in Kosovo filled their pages with articles written by diplomats and journalists, chronicles from the sites of massacres, testimonies of victims, statements from political parties, clips from the international press, and Serbian reporting on the trial, as well as the opinions of ordinary Kosovars.\* The most influential and widely circulated daily newspaper in Kosovo, *Koha Ditore*, published a cartoon of an imprisoned and angry Milošević, with prison bars wrought from the skulls of his victims:



**First Day of the Trial: Milošević in Prison** *Source:* Jeton Mikullovci, in *Koha Ditore*, 12 Feb. 2002, front page. By permission of Jeton Mikullovci and Koha Group Co.

But if the cartoon was meant to signal the end of the Milošević period and an opening for a triumph of justice and peace for the victims, it did not succeed. In the following days, it was Milošević—the Arendtian focus of the trial—who asserted his subjecthood, claiming historical truths and denying all the wrongs he was charged of, not only absolving himself but all Serbs of culpability.

After declaring that he did not recognize the Tribunal and that he would defend himself, Milošević in effect took on the role of a prosecutor, having all the rights to interrogate victims and witnesses. Not only did he directly question the experiences of loss, pain, and violence of the Kosovar Albanian witnesses, he bullied them. Milošević described witnesses as members of the KLA or persons who aided the organization; he asked—or even lectured—witnesses who were there to testify about the suffering they themselves had endured about KLA killings of civilians.<sup>4</sup> Milošević referred to witnesses as “fake and false.”<sup>5</sup> Moreover, he angrily corrected them when they referred to the “Serbian” military and not the “Yugoslav”

military, in an attempt to educate them on the multiethnic composition and equality of the Yugoslav army.<sup>6</sup>

The trial became a theatrical drama, with Milošević himself taking the center stage as the star actor. And in this role, he managed to score some propaganda points by challenging his accusers in ways that had considerable emotional effects on the Kosovar population. Some Kosovar Albanians, still imbued with a feeling of fear of the man who had terrorized them, suggested that the witnesses should have been better prepared to counter Milošević's questioning—especially, the first witness, Mahmut Bakalli, the intellectual and former Yugoslav Communist leader.<sup>7</sup> This kind of inferiority complex reflected the continuing trauma inflicted on Albanian psyches and memories by Milošević in his determination to protect the Serbs by all means—a determination Albanians traced back to Gazimestan.\*

That the spectacle of Milošević was given so much space to denigrate and belittle victims was deeply resented by Kosovar Albanians—even more than his denial of war crimes in Kosovo—as it provided him with a platform to continue to exercise power at their expense.<sup>†</sup> The chronicles of pain and truth-seeking of the victims represented in *Koha Ditore* were loaded with emotions of disgust, hatred, and rage against Milošević and the politics he represented. The victims saw the trial at most as partial satisfaction and asked about other perpetrators who were not at the ICTY. A few quotes from the first days of the trial illustrate this link between the emotions surrounding the trial and Kosovars' felt need for a broader juridical and political response:

“Slobodan Milošević is not the only guilty one” (V.B)<sup>8</sup>

“We would like in the trial to see other criminals, too” (Ahmeti)<sup>9</sup>

“Nothing is the same as it once was. There is no joy left. We had a wedding in the family, but without a wedding party.” “Nothing will bring them back. No verdict will suffice for what Milošević did” (Sabri Popaj)<sup>10</sup>

“Trying only Slobodan Milošević is not enough” (Ajmone Behrami)<sup>11</sup>

“Milošević should just be the beginning of a process” (Hysni Berisha)<sup>12</sup>

Such perspectives not only touch on the personal guilt of the mastermind of Kosovo's tragedy, but also collective responsibility. As Veton Surroi, then editor-in-chief of *Koha Ditore*, put it in an editorial published on the

first day of trial: “there is no doubt that Milošević is guilty of all the crimes, but Serbian society should start asking the question of how it was possible that it tolerated crimes committed in its name?”<sup>13</sup>

## II. Milošević: A Hero in Serbia

Naturally, these reactions were all merely incidental to Milošević’s courtroom strategy—a distraction from his rhetorical appeal to his core audience. The reaction to the *Milošević* trial in Serbia was radically, and predictably, different: As Bieber points out, Milošević not only got high marks for his performance but his popularity rating also increased considerably.<sup>\*</sup> Milošević’s downgrading of the pain and suffering of Kosovar Albanian victims played an important role in elevating his stature among the Serb public; it could also be interpreted symbolically as a victory for the Serbian nation over the Kosovar Albanians. Milošević’s framing of the trial as a vicarious contest of nations posited Kosovo as unable to defend itself, even when given the chance to do so through an international tribunal. Milošević’s approval ratings among Serbs were suggestive of their continued state of denial about crimes committed by their regime; his performance not only indicated but deepened Serbs’ feelings of victimization and ultimately contributed to a narrative about his martyrdom. Thus, nationalism, even if not in its more violent and extremist form, remained the defining political force in Serbia after Milošević’s death.<sup>†</sup> Although his personal popularity did not translate into votes for his party, the SPS, it played a part in sustaining the most momentous Serbian national question—what to do with regard to Kosovo—in the body politic.

Indeed, analyses of voting patterns are just one tool—and not sufficient—to understand the politics of a persona such as Milošević and his impact on national collective psyches. What should be stressed, rather, are the symbolic meanings and beliefs imprinted in the broader social structure of Serbia, which had sustained a system and a political economy of war for a whole decade in the 1990s. As Bieber makes clear, demographic changes, ideological incoherence, and internal party conflicts played a key role in Milošević’s “political death.”<sup>‡</sup> These factors are



important in explaining the dynamics of the SPS and the parties that formed coalitions with it or were close to it when it was in power. Yet parties of the former opposition that did not cooperate with the SPS, such as the Democratic Party, cannot be left out of the analysis of how Serbian party politics were affected: Although its rhetoric was more moderate, the Democratic Party remained deeply committed to the “national question” and to the Orthodox Church. Moreover, divisions within the political landscape in Serbia have to be taken into account and developed. Differences in political culture, tradition, and symbolism not only existed between the government and opposition but also within the opposition itself—“a clear distinction in the language used in political discourse and identity between the rationalists/modernists and the national romantics/neo-traditionalists.”<sup>14</sup> These divisions were external to and helped frame divisions over policy issues, including the national question.<sup>15</sup> They are deep social and political patterns, deeper than the Milošević era or his particular influence. The trial of Milošević only hardened the resistance of political parties in Serbia to coming to terms with the past and recognizing Kosovo’s struggle for self-determination and statehood; no major political party came to the conclusion that as a precondition for reconciliation it was necessary to issue an apology to the Kosovar Albanians for the brutality of the Milošević regime.

### **III. Transitional Justice in Kosovo**

These deeper patterns within Serbian politics and society, together with the shocked condition of a suddenly independent Kosovar Albanian political community, made the prospect of reconciliation extremely unlikely under even the most optimistic of scenarios. Yet, the *Milošević* trial made these long odds even longer, making it impossible to create a meaningful venue for rapprochement between Serbs and Albanians. It perpetuated a prevalent sense of victimization on the part of Serbian society and deferred any movement toward transitional justice in connection with the wars in the former Yugoslavia. The act of defining truth in transitional regimes relates to the extent of the successor society’s tolerance for multiple representations of the truth.<sup>16</sup> The authority of the ICTY has been

accepted by most Kosovar Albanians but not by Serbs in Kosovo or Serbia.<sup>17</sup> Indeed, according to public opinion polls, Albanians and Kosovars share the most positive opinions about the ICTY in South Eastern Europe.<sup>18</sup> A 2009 public opinion poll in Serbia, by contrast, showed that a large majority—72 percent of the Serbian population—had a negative view of the ICTY, while only 14 percent viewed it favorably.<sup>19</sup> An earlier poll, commissioned by the United Nations Development Program, had revealed that a large majority of Kosovar Albanians thought it was important to discover the truth about crimes committed in Kosovo, regardless of the ethnicity of the victims; only a small minority of Kosovo Serbs, on the other hand, had faith in the ability of judicial institutions to deal with war crimes.<sup>20</sup>

This difference was not only one of ethnicity but also experience: Over 93 percent of Albanians who took part in the survey declared that they had knowledge of war crimes based on personal experience.<sup>21</sup> Many Serbs hold views on events in Kosovo and at the ICTY that, though deeply felt, are also more abstract when compared with the strong and unmediated need on the part of the Albanian majority to deal with the past. Such differences favor the status quo: the continued construction of narratives stressing Serbian national victimhood, which in turn sustain collective feelings of injustice—and justification—among Serbs and in Serbia's relations with neighboring states.

In the absence of a domestic political will to try war crimes cases in Serbia\* or Kosovo,<sup>22</sup> the process of delivering justice for war crimes committed in Kosovo has been driven by international actors, with the ICTY being the main instrument for judicial proceedings. In theory, legal processes of truth-telling construct collective memory in periods of transition.<sup>23</sup> Yet, as the judicial processes addressing crimes in Kosovo have been almost completely dictated by outside players—as Trix also addresses from a different perspective<sup>†</sup>—they have failed to contribute to a shared historical memory of the sort that enhances social solidarity:

To be sure, the Kosovo Albanians fully supported the indictments of Serbian war criminals, such as Milošević. They were, however, critical of what they saw as lenient sentences given to them. And because they see the struggle against Serbian repression as legitimate, they strongly resist the notion that [Ramush] Haradinaj or other Albanians—accused of war crimes—should be put on a par with Serbian perpetrators.

The Serbs have reacted exactly in the same way: any notion of Serbian wrongdoing should be seen within the context of Albanian war crimes.<sup>24</sup>

Indeed, scholars have argued for the relevance of the psychological and emotional suffering of victims of war and its implications for postwar justice.<sup>25</sup> Besides, the emotions and experiences of fear, disgust, and anger of civilians who have been the primary target of “new wars” such as Kosovo<sup>‡</sup> have mostly remained unaccounted for in international media discourse and scholarship as well as in the ICTY’s trials. Yet addressing questions of cultural politics and emotional interactions—whether social or individual—is extremely important in postwar societies. The role of war crimes trials, in general, and the trial of Milošević, in particular, is important for achieving formal justice, but equally important is the role of trauma recovery as the basis for recreating a just and peaceful existence within and between societies that have undergone political violence. Repressing emotions—and de-emphasizing the role that justice has in processing emotions—will only ensure that the individuals who compose the ethnic groups and their warring parties will never be able to come to terms with their pasts.

## **IV. The Ghost of Milošević in Serb and Albanian Psychologies**

The death of Milošević in his cell briefly made what had become an interminable and long-winded process into a real drama, but one whose premature conclusion without judgment was an immense disappointment for Kosovar Albanians.<sup>26</sup> More than the technical termination of a trial, it symbolized a process of justice interrupted. That the ICTY had indicted Milošević, and that many witnesses to his crimes had testified, provided only partial justice. The *Milošević* trial failed to bring victims’ testimonies to the center—despite promises to do so<sup>27</sup>—for it allowed the main actor to continue his practice of dehumanizing victims in order to absolve Serbs of a criminal collective past. By giving Milošević a platform to manipulate history, truth, pain and suffering, the trial itself turned into an act of transgression against history.

Milošević's physical death and his trial's termination certainly did not end political narratives about Kosovo, which he had recast and popularized. The ghost of Milošević will hover over the psychic lives of the Serb and Albanian communities. And the angst that ghost evokes will shape discourses not only about the past, but also about the present and the future. Representations of Milošević as a hero in Serbia and as a criminal in Kosovo continue to reside in the symbolic exchanges between Serbs and Albanians at the cultural and political levels. This dialectic will continue to shape political and cultural constructions of the nation and national identity both in Serbia and Kosovo. Ultimately, the trial and the Tribunal left untouched the social landscape of survival: they were never venues for victims to claim justice through complementary processes, such as civil suits, people's tribunals, memory projects, or reconciliation commissions. Yet without such means of achieving justice, there can be no closure, no forgiveness, and no rapprochement.



## Conversations with Milošević

### Two Meetings, Bloody Hands

VETON SURROI

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*The person of Milošević was always going to be central to the trial, but Milošević's decision to represent himself placed him—his personality, his character, his competence—at the very heart of the proceedings. Presenting evidence, cross-examining witnesses, raising objections, Milošević displayed many of the qualities he had demonstrated in power—charm, bullying, tactical sense. Drawing on recollections and testimony, this chapter reflects on two meetings with Milošević—in Belgrade before the Kosovo War, and four years later in The Hague—and examines his performance. What was the experience of testifying about and in front of Milošević like? How did Milošević treat and deploy witnesses? What does his performance tell us about the trial and its legacy?*

### **I. Belgrade—At *Beli Dvor***

On 15 May 1998, at the insistence of Ambassador Holbrooke, a Kosovar Albanian delegation headed by Ibrahim Rugova sped its way to Belgrade. Holbrooke had persuaded Rugova—“bullied” would probably be the more appropriate word—to meet Milošević, making Rugova drop his policy of

many years' standing that the Kosovar Albanian leadership would meet the Serbian authorities only in an international context and with international mediation.<sup>1</sup>

I was one of the four other men Rugova asked to be in the delegation—the so-called G-5. Also present were Fehmi Agani, Rugova's closest aide; Mahmut Bakalli, the former Communist Party leader of Kosovo who would later be the first to testify in Milošević's trial;<sup>†</sup> and Pajazit Nushi, head of the Council for the Defense of Human Rights and Freedoms. When Rugova asked me to join, I was uncertain about what to do.

My uncertainty went beyond the change in policy; Rugova had decided, and there was not much that could be done about it. Instead, my dilemma was twofold—competing moral and practical concerns. I considered Milošević responsible for the state persecution of Kosovar Albanians, for the arrests and killings, for starting the wars in former Yugoslavia—his hands were bloody, and I found the idea of shaking them in his official residence morally repugnant. Still, I felt it was quite a risky situation for Kosovo—a meeting in which an isolated Rugova would meet the negotiation-hardened Milošević. The meeting was going to happen, and much could be lost if it went badly. It was politically risky—and therefore morally unacceptable—to leave Rugova alone in such a situation. I decided that I would shake the bloody hands, the price to be paid for a greater moral imperative: finding a way to stop the escalation toward war and a way to engage in a negotiating process for the status of Kosovo.

And so, on that 15 May, I was in one of the cars leaving Pristina. The same Milošević whom we felt was responsible for the revocation of Kosovo's autonomy and the persecution of its people had offered his airplane for our delegation, but we had declined. We found ourselves in a surreal situation: Milošević's secret police—the same ones responsible for arresting and terrorizing opposition activists in Serbia and beating up whomever they chose among the Kosovar Albanians—were escorting our cars, opening up the highway through a brutal show of automatic weapons to car and truck drivers who did not pull over fast enough. Around noon, we entered the gardens of the *Beli Dvor* in Belgrade.

Milošević greeted Rugova first, shaking his hand emphatically and saying what a pleasure it was to meet him. He turned to Bakalli and

greeted him by his first name, even though they had never met. He greeted Agani, saying there was no need to meet in secret when they could meet openly—a reference to speculation that Milošević and Agani had met secretly, though I believe this wasn't true. Then Nushi, and then it was my turn. I gripped his hand tightly and looked him directly in the eye. I remember that he couldn't hold the stare; he looked away.<sup>2</sup>

But if that was weakness, it was the only sign of it; Milošević conducted the rhythm of the meeting masterfully. He presented the face of a man who was ready to solve the petty problems of Kosovo, showing personal warmth to the members of our delegation and changing the course of the conversation every time there was a serious issue raised. When Rugova said we had come here with a firm belief in our goal of an independent state (nervously laughing as he said it), Milošević replied that as a host he should of course first offer us coffee, as is the tradition. When Bakalli said that he, Milošević, was the boss and therefore could stop the growing repression in Kosovo, Milošević answered that we should have a whiskey—"with a bit of lemon juice, like Marshall Tito did, right Bakalli?" When Agani noted that the agreement on education, which had been mooted,<sup>3</sup> was nowhere close to being implemented, Milošević said, "You see, I have my nationalists too, who create trouble, and all those university professors who are protesting in Belgrade—we will solve all issues, including those of the agreement, with the new law." (He did indeed solve some issues: The law enabled him to kick out all the liberal professors in Belgrade.<sup>4</sup>)

The only time he showed his bullying side was when I raised the Jashari family massacre, which had occurred at the beginning of the year. "Do you really think that the Serbian police can kill children?" he asked with a furious red face, and went on to explain, in operative detail, how the killing had happened: Jashari had killed his own family, Milošević concluded, because they had wanted to surrender to the police. He was extremely well-informed about the events at the Jashari compound in Prekaz; I felt as if he had just been briefed before our meeting, or had been following the events continuously.<sup>5</sup>

On his home turf and still invincible, his personal warmth was accompanied by a comfortable knowledge that no concessions would be made. The meeting generated no bilateral progress, other than to lay the

foundation for a future protocol-driven round of meetings. Importantly, however, no damage was done to our cause—part of my purpose in going. When the meeting was over, for all his smooth handling of our conversation, I knew the substantive gap between our views was enormous and unbridged, and I expected very difficult days ahead.<sup>6</sup> I was not wrong.

## **II. The Hague—In Courtroom I**

I would next see Milošević just under four years later, both of us having survived the dangerous months that followed our meeting: he NATO's bombing campaign in the spring of 1999, I the great possibility of being killed by Serbian forces—his forces—as I was hiding in different places around Pristina, a city being emptied of its Albanian majority that same spring through waves of expulsions. Now, early in the trial's *Kosovo* phase, I was called to testify. This second meeting would be a moral satisfaction: He was in The Hague, in the dock, and I was there, a free man, testifying against him.

### **A. No handshake**

For two days, on 18 and 19 April 2002, I was examined by the Prosecution and cross-examined by Milošević himself. The subject matter ranged from my personal background and treatment as a member of the independent media to Kosovo's position within Yugoslavia and its increasingly desperate struggle for independence.<sup>7</sup> As at our first meeting, the Jashari family episode came up. This time, though, the kind face he had adopted at the first meeting was gone, and so too was the attempt to create a warm and friendly atmosphere—no jokes and no whiskey this time. With Milošević directing my cross-examination, abuses and violations against citizens in Kosovo were again downplayed or diverted, though we spent plenty of time discussing my failings as a journalist, my privileged background, and my tendency to take up too much of the trial's valuable time.\* Milošević himself consistently ignored the procedural limits of cross-examination and became curt or aggressive when my testimony did not align with his own narrative.



## **B. The moral trial**

As Milošević was being prepared to enter the courtroom that first day, an image struck me as symbolizing, even more poignantly, the reversal of fortune. Beyond the half-opened door that was used to bring defendants into court, I could see a UN policeman taking off the metal handcuffs with which Milošević had come into the building. I had associated handcuffs with Milošević's rule for more than a decade; he was very fond of the scenes in which his political opponents would be cuffed and their heads shaved, a sign of his strength over the opposition—and now here he was, entrapped with his own symbol. I felt relief, satisfaction, an enjoyment that I sensed I should not be ashamed of: Seeing Milošević handcuffed did not produce the automatic empathy I had for years felt with people who found themselves in just such a situation, for this was morally different.

And this is the first issue that I think I should highlight: The *Milošević* trial was, for many people, an issue of morality. As such, it also created a clash of moral values: As several other chapters note, for many in the West and for the victims of Milošević's wars, the trial was a belated path toward justice.\* But for many Serbs, it was an injustice against not only Milošević, but against them, against the Serbian cause, against Serbia itself.

In an awkward way, Serbian nationalists were right that, through Milošević, the Tribunal had put all of Serbia on trial. Indeed Milošević did not create Serbian nationalism, but the other way around. Milošević came to power not as a dictator, but as the product of a social consensus—a consensual autocrat, with the blessing of a majority of Serbs for a long time.† During that period, there were more Serbs willing to fight wars than Serbs willing to stop them. Within this context, when Milošević was put on trial, so too was the collective responsibility of the people of Serbia. And in this sense, the abrupt end of the trial was even more disappointing, as it forestalled any possibility of determining where this collective responsibility ended and individual guilt began.‡

## **C. A Truth, not a trial**

Yet for Milošević, what was happening was not a trial; it was a panel on history. By not having a defense lawyer,§ he was transforming the trial into

an event of another quality altogether, in which his role would be defined as the guardian of the Serbian historic truth. Within this frame, the Prosecution and its witnesses were not sources of evidence; they were distortions of that truth.

This immanent, overriding, and Romantic purpose had its practical underpinnings. Milošević's ownership of Truth was continuously expressed through and supplemented with information that most likely came from the files of the SDB: witnesses were asked details of the most extraordinary precision about their villages, such as exactly how far an electricity pole was from their home—information the average villager would not possibly know, yet which Milošević did.

Milošević would tear into these witnesses when they could not tell whether those who committed atrocities—allegedly, supposedly, he would remind them—were soldiers or policemen. For Kosovar Albanians, of course it was irrelevant what kind of uniform the Serbs who had come into their villages had worn, but for Milošević, it was a way of showing their inconsistencies and therefore the unreliability, even implausibility of their stories. Discrediting witnesses from Kosovo's hinterlands was part of his defense of Truth against a world conspiracy between Western lawyers, the secret services of NATO countries, and Albanian peasants.

Whether this was, or would have been, successful in a conventional legal sense is beside the point: The trial, for him, was irrelevant from the point of view of forensic legal procedures; it was vital from the point of view of unlimited access to TV viewers—access that his political and legal opponents were generously providing him through subsidization of broadcasts of the trial in Serbia.\* It also appears to have contributed to a personal need to maintain a façade of control. When we met in 1998, Milošević was regarded by the West as a key factor in the maintenance of peace—a distasteful one, perhaps, but one whose opinion and acceptance was nevertheless vital. At that time, Milošević was plenipotentiary,<sup>8</sup> so our conversation was the kind one has with a person who is all-powerful: He was the problem, but he was also a part of the solution. By 2002, displays of his vast knowledge of events were one of the few remaining ways for him to project an aura of relevance and power.

## **D. Truth speaks a language**

The trial was held in three different languages—English, Bosnian-Croatian-Serbian, and Albanian—with simultaneous interpretation, and all three languages had their political, cultural, and social context and narrative.

Milošević was a university-educated, articulate, and confident public figure, trained in the law, experienced in public speaking, skilled at negotiations. By contrast, many of the Kosovar Albanians brought to testify about the crime base were villagers, often only semiliterate. They were there to speak about what they knew from personal experience, but they were not necessarily familiar with the broader world; few knew English, in which the business of the Tribunal was conducted in their presence.<sup>†</sup> And though they now confronted their persecutor, it was surely, for many of them, at least as much an intimidating experience as an empowering one.

All the social dynamics, the imbalances in power that had defined these peoples' lives were literally expressed in the language of their exchanges. Milošević, speaking in Serbian, was speaking to the people of Serbia; he was defending the Truth, the Serbian Truth—*pravoslav* in a literal sense. By bullying Albanian witnesses, he was playing the populist role—the role of national superiority—and the language he deployed conveyed this, even through the bare fact of being Serbian, the language of those who had power over them. (For others, of course, this bullying behavior simply reinforced an entirely different narrative.<sup>\*</sup>)

The Kosovar witnesses, in their Albanian, were mostly speaking to the court, in their narrative of victims. They never saw the KLA, did not know about the KLA; they were simply victimized for being Albanian—which might have been the truth, though not necessarily the entire truth—and testifying in Albanian was not only practically necessary but also a reenactment of their struggle in linguistic terms.

The judges and prosecutors, in their English, were speaking to the world and history—though a different one than Milošević's—trying to uphold the virtues of an international law that operated in a neutral space between and apart from Serbs, Albanians, and their languages. The judges were trying to maintain the impression that this was a trial over which they presided, despite the fact that the Accused had transformed it into an historic TV drama. They and the Prosecution were also, incidentally,



speaking directly to Milošević, who was fluent in English and who could (and did) switch languages as it suited him; but their exchanges with Albanian witnesses were almost always mediated through the interpreters. Despite the differences in their objectives and worldview, the Trial Chamber, Prosecution and Milošević were, at least in this way, sharing the same experience, and operating to the disadvantage of most Kosovar witnesses.<sup>†</sup>

All three languages were addressing different objectives; caught in translation, they constituted a narrative that could hardly reconcile its inner differences. There was no unified value system in the three languages, only different accounts, and different moral evaluations, of the same events. Milošević's language was one of Serbian state sovereignty as the right above all rights; the Kosovar Albanians' language was mostly one of the victims, a moral language unmediated by any technical legalisms; and the language of the Tribunal was there to create an impression of a separate legal space, and a fair one at that.

### **E. No Nuremberg—but still those bloody hands**

These inner contradictions—of language, of moral purpose—could hardly be resolved within the trial, because it lacked the basic conditions for a decisive resolution. The trial in which I testified could not even distantly resemble Nuremberg, as the basic precondition of victory, upon which Nuremberg had relied, was utterly absent. The Bosnian war had ended with a compromise that preserved many of the Serbs' wartime gains through the creation of the RS; in Kosovo, Serbian forces had withdrawn, but Resolution 1244 provided the political basis for Serbia to remain a party to negotiations about Kosovo's future.<sup>9</sup> Serbia's defeat was nothing like the total, unconditional defeat of Germany or Japan, and its ability to obstruct the exercise of the Tribunal's juridical work or extract concessions from the Prosecution was evident.

For a good part of Western public opinion, and indeed for the Prosecution, the trial was supposed to be the event that would do what military force had not: defeat Milošević and Serbian aggression in the former Yugoslavia. But courts do not create conditions of victory. And at least politically, if not legally, Milošević had a strong case against the image of him as the criminal mastermind that the Prosecution was



constructing.\* In Bosnia, he had been the essential negotiator who had stopped the war. Dayton had legitimized the very thing that was now, at trial, described as genocide; Milošević believed he could hardly be held accountable for something that everybody agreed was an acceptable outcome—which is to say, ethnic cleansing that had produced the quasi-state entity of the RS. Legally this made no sense, but this simply shows again that for Milošević, and for some of the trial's most important audiences, the legal aspects of the trial were not the point. My sense of moral satisfaction at testifying was, perhaps, even more relevant than I had imagined.

Still, as to my testimony's contribution, as to any sense of legal satisfaction: I don't know. After two days, my testimony was over, if not complete, my conversations with Milošević finished. But Serbia's undefeated defeat—which is also Milošević's legacy, written or unwritten, programmatic or not—continues. The RS and the unresolved relationship with Kosovo represent policies to which Serbia has made itself hostage. So, too, is the collective belief that Serbia was not the perpetrator of wars against other people. Milošević defended his Truth, and the trial did not reach a point where it could change or counter that—the preconditions of the trial, the divergent moral visions, and Milošević's tactic of self-representation, as much as his death, prevented any other outcome.

There will be a competition of reconciliation in the coming years. One rather unlikely path is that there will be a relatively quick reconciliation, a shaking of hands, between the people of former Yugoslavia who were caught in wars—it has only been just over a decade, after all, since the wars ended. The other path, more likely, leads toward a different kind of reconciliation: one in which the West reconciles itself with the fact of genocide, coming to treat it as just one of those Balkan follies that happened in the last century, and the century was full of them anyway.

## Underwhelmed

### Kosovar Albanians' Reactions to the *Milošević* Trial

FRANCES TRIX

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*How did Kosovar Albanians respond to the Kosovo phase of the Milošević trial, from February to September 2002? Adopting methods and perspectives of linguistic anthropology, and using Kosovar Albanian newspapers as principal sources, this chapter contextualizes and analyzes the major concerns of Kosovar Albanians as presented in their commentaries, editorials, and news reports over the course of the Kosovo phase. At the same time, we must be attentive to silences: A troubling aspect of coverage of the trial in Kosovo was the relative lack of attention to many witnesses. Specifically, the supposed time-saving strategies adopted by the Tribunal resulted in the elimination of oral testimony by significant witnesses, producing instead multiply translated witness statements, summarized by attorneys, that were far removed from their original sense and context. By foregrounding the testimony of Albanian Kosovars who were considered newsworthy in Kosovo—and others who were not—the chapter explores how the Milošević trial advanced a model of justice unresponsive to, even destructive of, opportunities for reconciliation.*

*All organs of the court should keep in mind the importance of making the proceedings meaningful to the communities most affected by the crimes.*<sup>1</sup>

ANTONIO CASSESSE

As part of its Outreach Program, the ICTY donated Judicial Reports, law journals, and books to the Law Faculty of Prishtina University in the summer of 2010, a fortnight after the Tribunal had called for the rearrest of former KLA leader and “former prime minister” Ramush Haradinaj, who had already been tried by the Tribunal and previously acquitted.<sup>2</sup> Perhaps the donation of materials was an effort to affect opinion in Kosovo<sup>3</sup> regarding the Tribunal, or perhaps the Tribunal was merely cleaning house as its mandate was drawing to a close. The stated purpose of the donation was “to increase understanding of the international criminal justice system and to cement the legacy of the Tribunal in the region of the former Yugoslavia.”<sup>4</sup> So, what will that legacy be? More historical distance is required to address this fully, but certainly central to that legacy will be the trial of Milošević, as it was the initial and most prominent work of the Tribunal related to Kosovo. To begin to understand the legacy of the Tribunal in Kosovo, we must examine the responses of Kosovar Albanians to the *Milošević* trial.

This chapter considers how Kosovar Albanians responded to the trial’s *Kosovo* phase, from February 2002 to September 2002. The main sources are print media, principally Kosovar Albanian newspapers,<sup>\*</sup> understood through the methods and perspectives of linguistic anthropology. The chapter contextualizes and analyzes the major concerns Kosovar Albanians presented in commentaries, editorials, and reportage over the course of the *Kosovo* phase. At the same time, an intriguing aspect of the media coverage of the trial in Kosovo was the relative lack of attention to many witnesses whose testimony one might have expected to be of great interest.

There are four parts to this chapter. The first presents initial reactions of Kosovar Albanians to the trial, including reactions from ordinary people whom reporters interviewed as well as commentary in which Kosovar editors responded to opening statements. The second part focuses on coverage of testimony by the two figures that drew the most press attention in Kosovo—Mahmut Bakalli early in the trial and later President

Ibrahim Rugova—and what this tells us about the Kosovar media’s sense of what mattered to Kosovar Albanians during the trial. Third, it considers the question of media silence around what might have been expected to be powerful testimony by other Kosovar Albanians who were direct witnesses to particular atrocities. To look at this in more depth, the chapter analyzes one day of testimony involving the Izbica (Izbicë) massacre—an event that Serbian media had asserted had never occurred. Analysis of the linguistic bases of the sole survivor’s statements and testimony suggests how tenuous the evidentiary basis introduced into the trial record can be. The fourth section moves back to a larger frame concerning general commentary on the trial, showing how Kosovar Albanians felt abused by the trial. It suggests that the ICTY has much to learn from people of the region—that cultural and historical knowledge would have increased its effectiveness. One of the core conclusions that should be drawn from the study of Kosovar Albanians’ reactions is the need for live testimony in court rather than summary written statements read by attorneys.

## **I. Initial Reactions of Kosovar Albanians to the Trial**

### **A. The context of the trial in Kosovo**

In analyzing the responses of Kosovar Albanians, their particular circumstances and expectations in the months preceding the trial should be kept in mind. In 2002, Kosovo remained politically fragile, its status uncertain both at home and abroad. Elections had been held in November 2001, but because of the split results a coalition government was formed only at the end of February 2002.<sup>\*</sup> The recent fighting in neighboring Macedonia, where Kosovar Albanians gave some support to Macedonia’s Albanians, had contributed to lowered support for Kosovo in the international community.<sup>5</sup> Further, after the 9/11 attack, the attention of the United States—Kosovo’s principal international supporter—had shifted away from the Balkans.<sup>†</sup>

This was also a time of growing mistrust of the international community in Kosovo. By 2002, the United Nations Interim



Administration Mission in Kosovo (UNMIK) was entering what became known as the era of “stagnation and confrontation.”<sup>6</sup> Attitudes toward UNMIK deteriorated further during the trial,<sup>‡</sup> but even before this, Kosovar Albanians did not hold a high opinion of the UN more generally. They had watched how the UN had operated in Bosnia during the 1990s, and its ineptness had given support to Rugova’s nonviolent movement<sup>7</sup> despite continued provocation from Serbian authorities. Kosovar Albanians knew that it was NATO and the United States, not the UN, that had supported them in their struggle with Serbia.<sup>§</sup>

The fact that the ICTY had been established by the UN did not improve its standing in Kosovo, and actions taken by the ICTY had not improved its image among Kosovars. The initial indictment of Milošević had been popular, but Del Ponte and international organizations cooperating with the ICTY contributed to Kosovar Albanians’ continuing mistrust when they ordered the arrest of former KLA leaders for alleged crimes against Albanian collaborators.<sup>¶</sup> Still, on the eve of the trial, Kosovar Albanians expected Milošević to be found guilty, and they expected their witnesses to be treated with dignity.

## **B. Before the trial**

Before the trial actually opened, while pretrial preparations were ongoing, one of the most intriguing reactions among Kosovar Albanians was the reluctance of some to testify.<sup>\*\*</sup> It was reported that only 60 percent of the 150 Kosovars who had earlier provided evidence had agreed to testify in person.<sup>8</sup> One woman, whose husband, son, and daughter had been killed in the Suva Reka (Suharekë) restaurant killing in March 1999, had survived by jumping from a truck loaded with victims that was headed to Serbia. The bodies of her family members—and those of the other victims, 48 civilians in all—were found two years later in a mass grave in Batajnica, near Belgrade. Yet commenting in *Koha Ditore* at the opening of the trial, she suggested that there was little point in testifying:

There’s no reason to [go to The Hague].... There are so many like Milosevic. He is not the only one to be blamed.... Where are his henchmen who fired on us? They are free.<sup>9</sup>

This woman's attitude was hardly indifference, given her history, but rather alienation born of concern that Milošević's trial would not be the only one. This is typical: The question of whether the *Milošević* trial would lead to other trials was crucial for Kosovar Albanians. Del Ponte had been clear that the Tribunal had neither the mandate nor the resources to be the main investigatory and prosecutorial agency in Kosovo, and that the vast majority of crimes committed during the armed conflict would have to be dealt with by the local Kosovar police and judiciary, under the mandate of UNMIK.<sup>10</sup> It would not be until 2006 that the other Serbian government and military leaders of the war in Kosovo—Šainović, Ojdanić, Pavković, Lazarević, Lukić, and Milutinović—would stand trial at the ICTY.<sup>11</sup> As for the internationally directed courts in Kosovo, by the time the *Milošević* trial began, three years after the war had ended, they had tried only 15 war crimes suspects.<sup>12</sup> Serbia tried its first soldier for war crimes in Kosovo in July 2002.<sup>13</sup>

Thus, at the time his trial opened, many Kosovars were angry that Milošević was the only leading figure to face justice. Hysni Berisha, of the Victims Identification Commission, reflected this sentiment, noting just before the beginning of the trial that “[t]he Milošević case should lead to the trial of all those who committed crimes in Kosovo.”<sup>14</sup> Meanwhile Kosovars watched the pretrial sessions of the *Milošević* case. One whose home was burned down by the Serbs and 11 members of whose village had been killed, remarked with disgust, “[t]hat murderer is enjoying a comfortable cell and makes fun of the court. If they won't do to him what he did to us, they might as well set him free.”<sup>15</sup>

### **C. The opening days**

The opening days of the *Milošević* trial were covered live in Kosovo by major television and radio stations, and by many accounts, most of the population watched or listened;<sup>16</sup> several major Kosovar newspapers termed it a “historic event.”<sup>17</sup> *Koha Ditore* published an entire supplement with the headline “One chief murderer, three wars, hundreds of thousands of victims.”<sup>18</sup> *Zëri*, another important Kosovar newspaper, ran a headline: “Cool-headed criminal listens to indictment.”<sup>19</sup>

In Pristina people watched in public places, pored over the Prosecution's opening statements, and reportedly went silent when Milošević appeared.<sup>20</sup> Some tried to downplay the trial: One 28-year-old student, whose education had been interrupted in the 1990s when Albanians had been forbidden to enter high schools or the university in Kosovo, remarked, "He's history. He's getting what he deserves. I wasted so many years because of him and I don't want to waste this day[.]"<sup>21</sup>

But, as Krasniqi also points out, most watched the proceedings with interest, and some in venues with special meaning. One man who watched from the main train station café explained, "It was from this train station that I was sent by his forces to become a refugee."<sup>22</sup> In the village of Reçak, site of the January 1999 Račak massacre that was crucial to involving the ICTY and the international community in Kosovo,\* people watched the trial together from the mosque. One villager announced, "Finally the main criminal, the butcher of the Balkans, is brought to court. He should enter into prison and stay there until he dies. But no sentence is sufficient for the suffering he brought on the people of Kosova."<sup>23</sup> The other villagers were pleased that Milošević would be brought to justice, but noted that he was responsible for many other crimes as well.<sup>24</sup>

The very public aspects of how the trial was watched by Kosovar Albanians contrasted with the more subdued reception in Serb areas. Some Kosovo Serbs watched from the last Serb restaurant in Kosovo Polje—the town where Milošević had begun his rise to power with his 1987 speech, and near Gazimestan, site of his 1989 speech—where there were still posters of Milošević on the wall, saying they said they felt closest to him there.<sup>25</sup> Although close to eighty thousand Serbs had left Kosovo after the war, those who remained lived in enclaves such as Gračanica or in the north. Still they did not criticize Milošević. One noted proudly, "The people were very satisfied with what they heard from him. Whatever he promised, he fulfilled." Another concluded, "He meant well but he went the wrong way about it."<sup>26</sup>

Serbian newspapers stressed that only Milošević was on trial. "He is on trial, not the nation," the front page headline in the mass-circulation *Večernje novosti* said, quoting Del Ponte's statement that Milošević was being prosecuted "on the basis of his individual criminal responsibility" and that there was no accusation of collective guilt.<sup>27</sup> The Albanian



newspaper from Tirana, *Koha Jonë*, elaborated on this, noting that Del Ponte was seeking to reassure Serbs who feared that his trial could turn into the trial of the entire Serb nation.<sup>28</sup>

Thus the question of whether Milošević's trial alone could adequately address responsibility for what had happened in Kosovo had already arisen when it became clear that Milošević would be tried alone. This theme was raised again with opening statements by Carla del Ponte and Dirk Ryneveld, in which the Prosecution's planned approach became clearer, but as with so much of the trial, these statements—with their evocation of the medieval era and Nuremberg—did not speak to the history of Kosovo in ways Kosovar Albanians could appreciate.<sup>†</sup>

Veton Surroi, founder and editor of *Koha Ditore*, took up the larger question of societal guilt and responsibility in a commentary on Del Ponte's opening statement. Accepting the Prosecution's rhetorical gesture toward Nuremberg, he drew the analogy with Hitler and other Nazi leaders, whom he acknowledged were to blame and deserved to be punished. But he also noted the responsibility of German citizens, thereby making the analogy relevant to the situation in former Yugoslavia because

Hitler and Nazism did not fall from the sky but were a product of their society. The same thing goes for Milošević. He is responsible for trying to turn his idea of a Greater Serbia into reality. However, a majority of the Serb society, including the Academy of Science and Arts, the university, the military, the Orthodox Church and ordinary citizens who called “we want weapons” during Serb meetings, contributed to the idea. Although Milošević will be tried today, the Serb population should also be held responsible for generating fascism amongst them. In the end, Milošević will have to pay for what he did, but Serb society must ask itself how it could have let crimes happen in its name.

Milošević's trial should ... explain how collective hatred could be spread throughout Serb society. The trial of Milošević and Hitler's ideology should explain how one society could reach such an exalted point of hatred toward another people.<sup>29</sup>

It was this understanding of the role of Serbian society in the war that was missing in the strategy of the entire trial—yet another reason that the trial should have been kept in chronological order to begin with the warmongering in the 1980s. This matters because if there is to be any reconciliation between Serbs and Albanians, an understanding of the pathology of Serbian society, especially during this period, is essential.<sup>30</sup> Surroi does not mention it, but besides hatred of Muslims, there is also



overt racism in Serbian society toward Albanians that compounds the problem.\*

Blerim Shala, the editor of the other main Kosovar newspaper, *Zëri*, took a different tack in responding to the opening of the trial, but one that also adverts to the need for the trial to be part of a broader reckoning. In his editorial, Shala referred to the mass graves in Serbia as “dead witnesses,” and noted that the Serbian government had revealed these graves just before deciding to transfer Milošević to the ICTY. He suggested that the crimes committed during the war in Kosovo alone were enough to warrant a life sentence for Milošević, but then he brought in what part the international community had played in the wars:

If The Hague prosecutors truly intend to explain the origin of Milošević’s crime in Kosova, then light will be shed on the connection between these crimes and a Serbian state tradition, and the support [Milošević] enjoyed in the highest Serb spiritual and intellectual circles. This would reveal the huge mistakes of the international community in Kosova and Bosnia during the period when it could have stopped the war in Bosnia and prevented the war in Kosova.<sup>31</sup>

Shala is referring to the long period in the 1990s when Kosovar Albanians held firm to nonviolence under Rugova but were not recognized by the international community.<sup>32</sup> It was only after the Albanians had been totally ignored in the Dayton Agreements of 1995 that the KLA slowly gathered momentum.<sup>33</sup> Thus for Shala, responsibility was not just with Milošević and the Serbs, but also with the international community; knowing what had gone on in Bosnia, and despite the long-suffering patience of the Albanians, it did nothing to stop Milošević in Kosovo until events had progressed to full-scale war.

After the first week, apart from ongoing interest in which witnesses the prosecutors would call, Kosovar Albanians continued to hold many reservations concerning the trial. Many believed that even if Milošević were convicted, justice would not have been served.<sup>34</sup>

The emphasis at the trial was on forced deportation.<sup>35</sup> From a prosecutorial perspective, this was understandable, given that 850,000 Kosovar Albanians had been expelled from Kosovo and many thousands of others were internally displaced—and indeed the massive displacement of Albanians had been one of the principal points of interest in Western

coverage of the war, as well as in NATO's justifications for its intervention<sup>36</sup>—but this was not news to the Kosovars.

And again the singular focus on Milošević as an individual, which for the Tribunal was the point of the trial, and a point of pride, read differently for the Kosovars. What angered many Kosovars was that others also responsible for the killing of thousands, of which three thousand were still missing, had yet to be brought to justice. Kosovars felt more pressure needed to be brought to bear on Serbia, and did not understand why the West gave aid to a Serbia that still had not handed over war criminals such as Mladić and Karadžić—especially as the only reason Serbia had handed over Milošević was for Western aid.<sup>37</sup>

In addition, and consistent with the general desire to see the trial embedded in a broader context, Kosovar Albanians resented the decision to limit the scope of the *Kosovo* phase to only include crimes committed from 1 January 1999 to 30 June 1999.<sup>38</sup> They especially resented that the repressive prelude of the 1990s and crimes committed by Serbian military forces, police, and paramilitaries during the final violent escalation from February 1998 through December 1998 were not included.<sup>39</sup>

## **II. What Mattered to Kosovars during the *Milošević* Trial**

There were articles on the *Milošević* trial across the seven-month period of its *Kosovo* phase. But by far the greatest number of articles in the Kosovar media was clustered at the outset of the proceedings, including the testimony of the first Albanian witness, Mahmut Bakalli, in mid-February, and around the testimony of President Rugova, in early May 2002. For Kosovars, Bakalli set the tone in an unimpressive manner, whereas the testimony of Rugova offered an opportunity to get across an important political message.

### **A. The Testimony of Bakalli**

The first witness for the Prosecution was Mahmut Bakalli,<sup>40</sup> a Kosovar Albanian and former Communist leader who had the unfortunate

distinction of having put down the 1981 demonstrations in Kosovo. Why the Prosecution chose Bakalli to testify first is not clear. The formal purpose was to make clear that Milošević had been warned that Albanians were being illegally oppressed in Kosovo,<sup>41</sup> but there were others who could have done this, and Bakalli was out of touch with the whole nonviolent movement of the 1990s.

Bakalli did not turn out to be an effective witness. His initial testimony was adequate if not inspiring, but on cross-examination Milošević was able to catch him in factual confusions of dates and events. He came across as unsure and unconvincing. From the Kosovar Albanian point of view it was a terrible beginning for the trial; it evoked an all-too-familiar scene where Milošević was in control, as he had been from 1987 to 1999.<sup>42</sup>

At first *Koha Ditore* tried to put the best face on a disastrous witness; Surroi noted that Bakalli had brought up details of history that he, Surroi, had not even known.<sup>43</sup> The next day, however, Surroi's newspaper reported on Bakalli's performance more fully, describing what he—and his readers—saw as a bizarre situation in which Bakalli had to answer questions from the Accused and Milošević had the right personally to challenge all witnesses who appeared.<sup>44</sup> Nothing in their own experience had prepared Kosovars for the spectacle of Milošević exercising his right to defend himself and all that that entailed in the trial.\* But rather than criticize Bakalli directly, *Koha Ditore* quoted a Belgrade-based ethnic Albanian correspondent, Fahri Musliu,<sup>†</sup> as saying that Bakalli had provided poor testimony during the trial. Musliu was surprised that Bakalli was unprepared, because “Bakalli is one of the best political analysts in Kosovo. He didn't make sure to argue carefully, and to make precise quotes of dates and events. Instead he stuttered like a dilettante and like someone who has never followed events in Kosovo.”<sup>45</sup>

The *Koha Ditore* article also quoted other former communist leaders such as Azem Vllasi, who were not satisfied with Bakalli's testimony. “He mixed up dates and events, and he forgot to mention many important events such as the protests of mineworkers in 1988, or the protests against constitutional changes in 1989”<sup>46</sup>—events critical to the development of Milošević's rule and to Kosovars' memories of repression.



Other newspapers were equally censorious. *Zëri* had the headline “Trial or political debate?” and suggested that Albanian witnesses did not have to debate with Milošević because he was a criminal and no longer a negotiator—again striking the note that, whatever the quality of Bakalli’s performance, the very fact of Milošević’s engaging him directly was even more problematic. *Kosova Sot* reported that despite efforts to protect the truth of what had happened in Kosovo, Mahmut Bakalli had made a weak showing as the first witness against Milošević, and noted that facing continuous questions by Milošević, Bakalli failed to offer many facts related to Milošević’s crimes in Kosovo.<sup>47</sup> *Epoka e Re*’s main headline was “Bakalli loses duel with Milošević.” It quoted a journalist in Pristina, “If all witnesses testify like Bakalli, then Milošević will be declared innocent.”<sup>48</sup> A young man in Pristina was also quoted as saying, “Was Bakalli thinking that he was going to attend a wedding?” emphasizing how unprepared Bakalli appeared.<sup>49</sup>

It does appear that Bakalli was unprepared for what he would face. Was that the fault of Bakalli or the Prosecution? After all, the Tribunal allows the practice of proofing witnesses. At a later date Bakalli claimed that he had gotten confused by the translation format. Milošević spoke in Serbian, as his real audience was the Serbs. Bakalli knows Serbian and Albanian, and just as he was getting ready to respond to the question from Milošević, he reported, the translation in Albanian would come on his headset and would distract him.<sup>50</sup> This does not totally explain his performance, but it helps explain some of the stuttering and arrhythmia in his testimony. Overall he was a poor choice for a witness, let alone the initial witness. But even more telling was the reaction of Kosovars, who saw a political defeat in his weak showing and a missed opportunity to frame the trial in their terms.

### **C. The testimony of Rugova**

President Rugova’s departure for the ICTY to testify was itself news. All Kosovar newspapers heralded this as a sort of faceoff between Rugova and Milošević. There was certainly some basis for this. Apart from the trial, Rugova needed to publicly confront Milošević in order to explain to his own constituency the ways Milošević had used him in the 1990s, especially during the war, when Rugova had been under house arrest in



Pristina, then taken to Belgrade to meet with Milošević, and finally flown to Italy. Although these meetings proved useful to the Prosecution,<sup>51</sup> they had damaged Rugova politically.<sup>52</sup> Yet this framing also fit into a pattern similar to what was occurring in Serbia—a tendency to analyze the trial in terms of a personal or national confrontation rather than a legal process.\*

All the Kosovar newspapers ran articles on Rugova's testimony, and all except *Epoka e Re* termed it “dignifying.”† President Rugova first answered questions from the Prosecution focusing on Belgrade's repression in the late 1980s and 1990s, describing the abrogation of Kosovo's autonomy in 1989, the expulsion of Albanians from their workplaces, and the LDK's later efforts to organize a parallel system of education for Albanian students. Rugova focused on his philosophy of resistance and Kosovar political parties' evolving views on the status of Kosovo, from advocating a republic within the SFRY to the Kaçanik Constitution of 1991. Rugova emphasized that the policy of Milošević's regime had radicalized the situation: “We always wanted to find a peaceful solution, but we were also afraid that if there were no results people would react.”<sup>53</sup>

Rugova also addressed the most sensitive issue, and one of particular interest for his Kosovar audience—his meeting with Milošević during the NATO intervention: “I was under house arrest,” said Rugova. Serbian policemen and soldiers had forcefully entered his house in Velania. Rugova said he preferred to go to Macedonia with his family, but was told that was not possible. Instead he was forced to meet Milošević in Belgrade. “At first I didn't accept, then they insisted and I went to Belgrade against my own will.” Rugova said the Serbs forced him to sign agreements.<sup>54</sup>

Over two days of cross-examination,<sup>55</sup> Milošević took up the political and national challenge the Kosovar media had foreseen, asking Rugova if he thought the Albanian people had been used by NATO<sup>56</sup> and if Serbs would ever give up Kosovo. Rugova replied,

Yes, I think that they will and should give up and [*sic*] Kosova.... Kosova belongs to the Kosovars. That is the Albanian majority [and the minorities, including the Serbs]. So I don't know what Serbs you are talking about... [b]ut if you mean Belgrade,... the sooner [they give up Kosova], the better we'll be.<sup>57</sup>

As he did with all other witnesses, Milošević asked Rugova if he thought the KLA was a terrorist organization. After Rugova said that he did not agree with such a conclusion, Milošević started quoting papers and statements saying that the KLA was a terrorist organization. Rugova responded to the Judge: “He may read these things all day. These are speculations of various kinds. The fact is that the majority of the KLA were people who had come out to defend themselves and their homes.”<sup>58</sup>

Overall, the headlines of articles on Rugova’s testimony in Kosovar newspapers considered that it had been important for Rugova to confront Milošević. *Koha Ditore* framed the confrontation historically with “Rugova and Milošević reveal unknown chapter of war,” while *Zëri* focused more on Rugova with “Belgrade decided to destroy Kosovo with war and violence, says Rugova.” *Bota Sot*, the LDK paper—and therefore the most pro-Rugova—was prosaic with “Kosovo President testifies at The Hague Tribunal,” while *Kosova Sot* again brought it back to Rugova with “A dignifying testimony of President Rugova.” Only *Epoka e Re*, the newspaper of the opposition PDK, criticized Rugova as an average witness, arguing that, as the leader of the Kosovar Albanians, he should have been clearer and less confusing. Albanians also reported that international coverage noted that Rugova laughed outright at Milošević’s description of the world “conspiring against Serbia and Serbs.”<sup>59</sup>

Equally interesting was the popular reaction to and media coverage of Rugova’s return to Kosovo, and his reflection on the meaning of his own testimony. All the way back from the airport, Rugova was greeted by thousands of citizens who had come out to welcome him. The newspaper of Rugova’s party, *Bota Sot*, wrote that they had come out to congratulate him on his successful testimony at the ICTY.<sup>60</sup> Rugova himself described his own testimony in terms that connected it to the individual and collective suffering of ordinary Kosovars:

My testimony was a satisfaction to Kosova and to me. I testified on everything that happened in Kosova: crimes, massacres, violence, victims, the genocide and mass destruction that happened in Kosova.<sup>61</sup>

It was an honor to testify at The Hague on behalf of Kosova. I was honored to testify for the people of Kosova; and for me personally, I testified as an ordinary Kosova citizen and as President of Kosova.<sup>62</sup>

And perhaps most important to Kosovar Albanians, Rugova framed his testimony as a contribution to the national project of Kosovo's independence. Rugova, above all politicians, is associated with the independence of Kosovo. Before anyone dared voice such an idea, Rugova had come back from study abroad (with Roland Barthes in Paris in the early 1980s) convinced that Kosovo would become independent, and he never wavered from this. His friends derided him,<sup>63</sup> and circumstances throughout the 1980s and 1990s were grim, but Rugova held to this profound dream. He never lived to see it come to pass, dying of lung cancer in 2006. So when Rugova spoke of independence in 2002, people listened, and indeed he framed his testimony in precisely these terms, rather than simply as a technical, forensic issue of individual guilt: "I opened the issue of Kosova's independence at The Hague. Kosova's independence should be recognized as soon as possible, because *de facto* Kosova is independent."<sup>64</sup>

The issue for Kosovar Albanians was not the verdict in the trial of Milošević. They had themselves experienced the oppression, the forced deportations and killings of family and neighbors, and they hoped that the trial would make clear what had happened in Kosovo. So far the trial had not gone as they had expected, with Milošević taking too central a role, and Albanian witnesses not presenting well or being inadequately prepared. But these were secondary matters; what truly mattered was what happened then, in 2002, in Kosovo—that it gain independence, not languish under the UN or be returned to Serbia. So Rugova's testifying at the Tribunal was a contribution to the national project—an opportunity to remind the world that Kosovo was still there, and that what Kosovars needed was independence. That is what truly mattered to Kosovars at the time of the trial in 2002.

### **III. Unexpected Silences: Media Coverage and “Saving Time” in the Trial**

Between Bakalli's testimony in February and Rugova's in May, there was a gradual decrease in coverage of the trial in the Kosovar print media, resulting in periods of actual silence. Again after Rugova's testimony,



there was only sparse coverage through the summer to the end of the *Kosovo* phase in September. What caused this apparent waning of interest in the trial in Kosovo?

After Bakalli, the next three Albanian witnesses were villagers who had lost many family members in the war. Milošević was aggressive to the point of hectoring: one of the villagers on the second day refused to respond to Milošević further.\* Their testimony was covered in the Kosovar newspapers, with reporters questioning the propriety of Milošević's acting as a jurist and decrying the way the villagers had not been better prepared for what they had to face in the courtroom. At the same time, the villagers were evasive; when Milošević asked these early witnesses questions about the KLA—and he asked every Albanian witness about the KLA—they responded that they did not know anything. It is rumored they had been advised to deny knowledge of the KLA, although others held that it was natural for Albanians to deny knowledge of KLA activities to any Serb leader.\* Either way, it did not add to their credibility at a time when Albanian witnesses were being examined closely by Serbian and international media.

By the end of February and into early March 2002, there was much less coverage of the trial in Kosovar newspapers. Certainly other more important events were competing with the trial for attention. At the end of February a coalition government was finally formed in Kosovo with the president from the LDK, and the prime minister from the PDK. In March, the main news in the region was the further disintegration of the FRY into what the Kosovar press recognized as a “fictitious federation[,]” for Serbia was 17 times larger than Montenegro.<sup>65</sup> But also in mid-March Serbia stopped transmitting the trial live, showing that interest there had waned too,<sup>†</sup> and after Paddy Ashdown's testimony on 17 March, Milošević became ill and the hearings were suspended. The trial resumed in April, but if press coverage was an accurate barometer, interest had waned. Or were there other factors at play?

### **A. Saving time? Analyzing one day's testimony**

Increasingly, Kosovars were not pleased with the way the trial was being conducted. After Carla Del Ponte visited Pristina in April 2002, she was interviewed by the local press, and their very questions—“Are you



satisfied with the way the trial is going, the way the accused is acting, and with eyewitnesses' answers?"<sup>66</sup>—suggested that local Kosovars were not satisfied.<sup>‡</sup>

Some of this dissatisfaction sprang from procedural changes that had been imposed with the aim of cutting the length of the proceeding and speeding up the trial. In the sixth week of proceedings, the Trial Chamber made a ruling allowing submission of written statements rather than purely oral testimony,<sup>67</sup> although Milošević complained and was given the right to cross-examine all witnesses.<sup>68</sup> A time limit was also placed on the *Kosovo* phase, with the number of sites reduced from 120 to 90—and instead of five witnesses for each of the 24 sites listed in the indictment, only one to two would be allowed in many instances.<sup>69</sup> The judges made these changes as exercises in trial management, but they also may have affected the newsworthiness of the trial for Kosovars. They clearly reduced the number of Kosovars testifying, and drastically reduced the time witnesses were allowed to explain in their own words what they had experienced. But Milošević was not affected in the same way; he continued to take just as long for his cross-examination. In fact these supposed time-saving measures allowed Milošević to dominate even more.<sup>70</sup> Only the victims lost, but because they had no real advocates, no one seemed to notice.

To try to understand these “time-saving” measures, consider a transcript for one day after the new procedures had gone into effect—24 April 2002, when four Kosovar Albanians testified. One of these witnesses was Sadik Januzi, the sole survivor of the Izbica massacre that head attorney, Dirk Ryneveld, had chosen to describe in his opening statement.<sup>71</sup> This massacre was also important because the Serbs had tried to cover it up. During the war Belgrade had alleged that the massacre had not occurred, and had even had a supposed Albanian shepherd testify on Serbian television that no massacre had taken place there.<sup>72</sup> The 138 bodies had been dug up and were still missing.<sup>73</sup> This was a day, in other words, when there was at least one witness whose testimony appeared to matter both to the case and to the region.

There were four Kosovar Albanian witnesses called on 24 April: a 30-year-old journalist, Shevqet Zogaj from Mališevo (Malisheva); a 36-year-old interpreter and elementary teacher, Osman Kuci, from Suva Reka

(Suharekë); an unmarried shopworker, Hadije Fazli, from Turićevac (Turiqec); and an 80-year-old retired farmer, Sadik Januzi, from Brojë. The first two had witnessed events in Suva Reka—the OSCE KVM’s mission’s departure and the subsequent massacre there. The second pair had witnessed events in Drenica (Drenicë)—mass expulsions and killings—with Januzi being the sole survivor of the massacre at Izbica; both had subsequently been forced out of Kosovo to Albania.

That day, the Chamber was in session from 9:30 in the morning to four in the afternoon, with a half-hour break in late morning, and an hour-and-a-half lunch break. The trial was in session for four-and-one-half hours, with the official transcript running 104 pages in English.<sup>\*</sup> As shown in Table 1, this was taken up with six major areas: cross-examination by Milošević, cross-examination by the *Amici Curiae*, discussions of procedure and Tribunal policy, reading aloud witness summary statements, Prosecution reexaminations, and complaints by Milošević about telephone usage. There was a great variation in the time spent on each subject. A rough estimate of this imbalance can be seen through percentages of pages of the official English transcript in each of the six major areas.<sup>†</sup>

TABLE 1 *Milošević* Transcript 24 April 2002: Time Spent on Subjects

Areas of Court Proceedings	Percentages of Pages of Transcript
Cross-examination by Milošević	69
Cross-examination by <i>Amici Curiae</i>	10
Court procedure & Tribunal Policy	9
Reading aloud witness (4) summary statements	6
Prosecution reexamination <sup>*</sup>	3
Milošević complaints about telephone usage	3

<sup>\*</sup> There was no reexamination of Hadije Fazliu or Sadik Januzi. See *Milošević case* (118), Trial Tr. 3759, 3777 (24 Apr. 2002).

The session began with Milošević complaining about telephone usage. The first two witnesses had the summaries of their statements read, and then they were examined in the morning; the last two witnesses were given less time but were similarly examined in the afternoon. The discussion of procedure took place just after the lunch break, followed by Milošević's second sequence of complaining about the telephone.

Would such a proceeding be of interest to Kosovar Albanians? It is difficult to imagine a Kosovar newspaper that would be interested in reporting on this kind of proceeding. Close to 80 percent of it is taken up with cross-examination by Milošević and the *Amici*, while only 6 percent is witness testimony, and 3 percent is reexamination. Critically, the witness testimony was not given orally, but consisted of a Prosecution lawyer reading summaries of written statements into the record. Except in response to questions, Kosovar Albanian witnesses never actually testified in their own voice.

Milošević was certainly insulting and abrasive, as he had been since the first month of the trial. In his first question to Osman Kuci, Milošević asked when he had graduated from university; Milošević would have known that, as an elementary teacher, Kuci had never attended university, but rather a pedagogical institute.<sup>74</sup> His questioning, based on Serb secret police records—known to be notoriously inaccurate regarding Albanians—was also tedious. He had trouble with Albanian names, for example referring to a witness named Qamil as “Namil[.]”<sup>75</sup> Unlike Kosovar Albanian witnesses in the first month of the trial, the witnesses on 24 April were much more forthcoming regarding KLA actions in their regions—but here too, there was little that Kosovars would not themselves have known. In all, there was little of substance or even dramatic confrontation, and Milošević's tactics, though certainly offensive to Kosovars, were not, or at least no longer, newsworthy.

Milošević's cross-examination took up most of the day; the other participants hardly elicited testimony of particular salience for a Kosovar Albanian audience either. The main prosecutor's interventions focused on the number of witnesses he would be able to call in the entire segment,<sup>76</sup> while one of the two *Amici Curiae* disputed with a witness whether she had been afraid of being bombed in a factory or being raped in a factory.<sup>77</sup> And when Milošević took the floor in his other role as Accused, he complained



about being isolated<sup>78</sup> and repeatedly about not getting enough telephone use.<sup>79</sup> At the end of a long and unstrategic day, Sadik Januzi, the only surviving witness to one of the mass critical killings, plaintively told Judge May, “But you haven’t asked about what I went through at the Izbica massacre!”<sup>80</sup> Indeed no one had.

## **B. Questioning witness statements**

Judge May tried to reassure Januzi that the judges had read his statement.<sup>81</sup> But because these written statements have taken on more value as fewer witnesses have been allowed to testify directly and publicly in their own words about what they experienced, it is worth considering how reliable they really are. In particular, because our focus is on what logically should have been the critical testimony on 24 April 2002, we should examine the background of Sadik Januzi’s written statement to see how dependable it really was.

Januzi actually gave two statements.\* The first was given on 23 April 1999 in Tirana, and mainly concerned the events leading to Izbica. It was taken by an Albanian interpreter, Alireza Islami, who translated it orally into English for a Frenchman, Yves Roy, who wrote it down in English. The interpreter then orally interpreted this back to Januzi in Albanian, who declared orally that it was accurate. This English statement from Roy—not a transcript of the actual Albanian utterance—was then translated into standard Albanian, a largely Tosk dialect, by the interpreters of the ICTY. Januzi does not speak standard Albanian but a northeast Geg dialect;† the final Albanian version—actually based on the official English version—could not possibly have been spoken by Januzi.

Januzi gave a second witness statement as well, taken on 21 October 2001, presumably in Kosovo. In a similar process, the interpreter, Ardiana Sadikovic, took Januzi’s oral Geg Albanian statement of what happened after the Izbica massacre on the way to Albania. This she interpreted orally into English for Annette Murtagh, who wrote it down in English. Sadikovic then interpreted the English back orally into Albanian for Januzi to declare that it was what he had said. Again, this English statement was then translated into standard Albanian at the Tribunal.



Any linguistic anthropologist would be appalled by this procedure. Indeed, anyone who has ever played the game “telephone” knows how readily language is modified even at one or two removes. These oral interpretation and translation moves allow for multiple changes, and the translation into standard Albanian from English adds another layer. On top of this is the problem that those taking the witness statements are often investigators who are not native speakers of English (such as French, Austrian, and Bangladeshi citizens).<sup>82</sup>

A recent study on witness testimony in international criminal tribunals found more than 50 percent of prosecution witnesses testified in a way that was seriously inconsistent with their pretrial statements.<sup>83</sup> It is unlikely that the problems with Kosovar witnesses’ pretrial statements were as serious,<sup>84</sup> but the probability for miscommunication and error with interpretation and translation across languages and dialects, spoken and written forms, is extremely high. From a linguist anthropological perspective, we do not have a true witness statement by Sadik Januzi: Instead, we have approximations made to save time and accommodate the English-speaking personnel of the Tribunal, and we have nice standard Albanian forms translated, not from Januzi’s original Geg utterances, but from those English renditions.

With this pragmatic linguistic construction, euphemistically called a “witness statement,” as a temporary document showing that he had something of value to say, Sadik Januzi should plausibly have been identified as someone whose testimony would be probative. He therefore should have been allowed to testify, to tell the experience of the massacre of Izbica in his own Geg Albanian dialect for posterity. This could have been interpreted fully into English and Serbian during the proceedings.<sup>‡</sup> That would have been a true witness statement of value, and one valued by the Kosovar media. Although it would not have been valued by Serbian media in 2002, it would have become part of a documentary record that would be available if and when Serbs were ready to hear what had happened in Kosovo.

Instead Ryneveld read what he described as a “skeleton trial summary”<sup>85</sup> of the two written statements—yet another layer of abstraction, and one constructed by him, rather than by the witness. Milošević then asked Januzi several questions about KLA activities and

Serbs in the region, and the *Amicus Curiae* asked about his departure to Albania. There was no redirect. And no one brought up the central event of the massacre at Izbica despite Januzi's repeated pleading to be allowed to describe what he and only he had lived through.<sup>86</sup>

## **IV. The Tribunal's Other Translation Failure: Misunderstanding the Region**

The *Kosovo* phase of the trial was an awkward learning experience—the preparatory phase made public—and policies approved there were used in the *Bosnia* and *Croatia* phases. It is also possible to see in the *MOS* trial of Milošević's co-indictees that the Prosecution has applied lessons learned from the *Kosovo* phase—focusing on fewer deportation and killing sites to make their points.<sup>87</sup> But for Kosovo itself, the *Milošević* trial was not a success, and the tepid local media coverage was an indicator of this. As some of the other chapters suggest, the response in Belgrade—where some likened the trial to a football match—was even more an indicator of things gone wrong.

### **A. Disconnection from Kosovar agendas**

Several months after the end of the *Kosovo* phase of the trial, a commentary on the trial in a Kosovar Albanian newspaper noted:

The trial of Milošević at The Hague did not arouse the emotions of European and world citizens. Even Albanians perceived it with reservations; however, the Serbian state welcomed it with pleasure. Europe hadn't felt the burden of crimes committed by Serbia as it felt the burden of Nazi crimes. Of course, Serbs knew this and through tremendous political pressure managed to turn the most recent tragedy of the Balkans into a private animosity between The Hague chief prosecutor Carla Del Ponte and the criminal Milošević. This was the best way to make the world perceive this trial as only an indictment against a local minister of corruption. By trying some individual criminals, The Hague tribunal has not managed to bring the organized crime of the Serbian State to justice.<sup>88</sup>

The author, Besim Zymberi, testified to the anger Kosovars felt toward the ICTY for missing the larger picture of what had happened to them under

Serbian rule. Here the restriction of the trial to considering only six months of war crimes was deeply disturbing to Kosovars, who felt at the very least that 10 years of oppression should have been in the dock—and some would have stretched it to 87 years.<sup>89</sup>

But the next point in his commentary, and one representative of the Kosovar press, is the deep resentment of the ICTY for its indictment in 2002 of former KLA leaders for alleged crimes committed against Albanian collaborators from 1998 and 1999. Not only were these acts in no way comparable to Belgrade's state terror against Albanians throughout the 1990s, but reports about them could only have come from the files of the SDB. What place did the international community have in imposing its justice in what was perceived as an internal Albanian matter dealing with collaborators? For Kosovars, it was not an international matter.

The reception of the trial of Milošević among Kosovars was already problematic given the latitude afforded Milošević, the poor preparation of witnesses, and the stifling of their public testimony in the “interests of time.” So the arrests in the summer of 2002 of former KLA leaders led to demonstrations in Drenica, the region where the KLA had originated. The ICTY Outreach Program organized a workshop in Vučitrn (Vushtrri) in Kosovo for one hundred Kosovar lawyers and brought three judges from the Tribunal to explain the Tribunal Proceedings to them. The Kosovar press noted this without comment. For Kosovars, the ICTY's value was to be measured, not by its achievements as a forensic legal process, but by its contribution to the national project of winning independence; trying Kosovars for their internal struggles had no part in that.

## **B. The Tribunal's lack of understanding of the region**

What was missing at a profound level in the *Milošević* trial was an understanding of the historical perspectives of the peoples involved in the crimes being prosecuted. Such an understanding was needed if the trial was to successfully counter the Serbian view of events. That is why the massacre at Izbica mattered, for example: At the time, highly censored Serbian media had declared it had never occurred and this misinformation needed to be directly countered.

On a broader scale, understanding the history of the people involved in the war crimes should have been a powerful determinant to keep charges



in *Milošević* in their historical order. The Prosecution had made a strategic decision to join the *Croatia*, *Bosnia*, and *Kosovo* indictments into a single trial, under a single overarching theory that implied a view of the conflict's development.<sup>90</sup> Yet the Prosecution abandoned this logic by putting Kosovo first—and many Kosovars felt that, by reversing the chronological order of events in the trial, the Prosecution gave Milošević an extrajudicial advantage in that he could play to anti-Albanian and anti-NATO sentiment in Serbia. The Prosecution focused its attention, and Milošević's, on the people most despised by the Serbs—the Albanians, with NATO as an added weapon. This approach played into existing anti-Albanian sentiment in Serb society, allowing Serbs to continue ignoring their role in the events that led to the dissolution of Yugoslavia.

Other ways in which the trial ignored local contexts cannot be explained merely as the ill effects of the Prosecution's strategy. The treatment of witnesses at the Tribunal further alienated both participants and those watching in Kosovo. The actual process of testifying was harrowing enough: Kosovar Albanian witnesses felt used and abused—they came all the way to the ICTY, only to be harangued by Milošević and not allowed—just as Sadik Januzi was not—to tell their own experiences, which was deeply frustrating.<sup>91</sup> Further, Kosovar Albanian women who had testified as anonymous witnesses found that their identities were protected while at the Tribunal, but revealed back in Kosovo. Some Kosovar Albanian women, who were victims of rape by Serbian forces during the conflict in Kosovo and later testified against Milošević, reportedly threatened to commit suicide if they were returned to Kosovo.<sup>92</sup> “I don't want to return, I feel endangered and I would rather live on the streets than return to Kosova,” said one of the witnesses, adding that all other Albanian witnesses felt betrayed by the Tribunal, when they had no alternative but to return to Kosovo. In September 2002 the women refused to return to Kosovo.<sup>93</sup> Sevdije Ahmeti, cofounder of the Center for the Protection of Women and Children, who had organized their testimony at the Tribunal, said she would never again counsel women who had been raped to testify in such circumstances.<sup>94</sup> If the Tribunal had understood the importance of family honor in Kosovo, perhaps it would never have requested the women to testify,\* or at the very least, it would have worked harder to guarantee their anonymity.



This patterned and pragmatic inattention to history and to the voices and perspectives of witnesses was not limited to the process of producing Kosovar witnesses' statements and reducing them to text, or to inattention to the needs of those testifying; it informs the entire trial process. Reading the trial transcript, one is struck by the Tribunal's deep insensitivity with regard to place names in Kosovo. The Serbian forms are often used exclusively; when there are references to maps to locate the domiciles of the Albanian witnesses—often places exclusively populated by Albanians—the place names are always given in Serbian forms. The Prosecution had adopted this practice for the original *Kosovo* indictment even though—as its personnel knew<sup>95</sup>—Serbia had used language as a means of oppression. Throughout the 1990s only the Serbian forms were allowed on signs throughout Kosovo, while the Albanian forms were forbidden. In this context, reference to the Serbian “Srbica” instead of the Albanian “Skenderaj” matters. Use of Serbian names continued lingual oppression, or at the very least, showed insensitivity in evoking the period of oppression. Kosovars listening to the trial would immediately have picked up on such signals by the Tribunal.

### **C. Witness testimony: The missed opportunity to establish a living record**

The written testimony format that the *Milošević* trial adopted—based on multilayered interpretations from local languages and dialects, translated into and out of English, and presented without direct testimony—is inadequate on several grounds. It is essential that the testimony of witnesses to important war crimes be given orally, directly, and in open proceedings, video-recorded, transcribed, and translated into relevant languages—here Serbian, Albanian, and English.

First, to ensure confidence in the original transmission, the witness statement used at trial should be based on a statement directly composed from the actual utterances of the witness—in Januzi's case, this would have meant the initial translator would have recorded Januzi's words in his dialect, and from this the English version would have been produced.

Second, witnesses should testify directly and be recorded for posterity. On psychological grounds, it is not meaningful to the witness to have a prosecutor read aloud a summary of an experience one has had in place of

recounting that experience oneself. It is also bad for press coverage and popular reception in the region: summaries flatten out events, rendering them impersonal and therefore less newsworthy, as was the experience with *Milošević* in Kosovo. If the trial is meant to influence attitudes and understanding in the region—both among Serbs and Albanians—it needs to be alive and worth transmitting.

Undoubtedly, the length of the trial was an important concern driving the turn to written statements, but the more logical way to save time would have been by prioritizing and focusing on the most important crimes. Instead, the Tribunal, committed to an expansive review of representative crimes, tried to save time by silencing its own carefully selected live witnesses and victims, converting what would have been historic oral testimony into readings—by prosecutors—of “skeleton summaries” of multiply mediated texts.

The future value of such texts is questionable; if, say, in 10 years the Serbian people are ready to hear what happened at Izbica, they should hear it from Sadik Januzi, the sole survivor, but by then he will probably be dead. “The voice of the victims” that Antonio Cassese, the first president of the Tribunal, had insisted must be heard,<sup>96</sup> will no longer be available. There will be only the Tribunal’s “time-saving” texts.\*

#### **D. Another way of speaking: Adem Demaçi and the value of local knowledge**

One could usefully contrast the ICTY’s approach with that of Adem Demaçi, a Kosovar politician and long-time advocate of independence who spent 28 years in FRY and Serbian jails as a political prisoner and is known as the Kosovar “Nelson Mandela[,]” and who enjoys considerable esteem in the region.<sup>97</sup> A month after the trial began, Demaçi gave a talk at the National Library in Pristina in which he noted the usual political interpretation of the trial, but also the value of domestic justice that involved the Serbs themselves—in a way that shows the basic structural defect in the idea of holding a trial at the ICTY, with all that implies: “Milošević should be tried and punished by his own people.... The greatest punishment will be the independence of Kosova. This we must do ourselves.”<sup>98</sup>

Ideally it would have been better for Milošević to have been tried by the Serbs. But would this have happened? Perhaps he would have been tried for corruption, but it is not clear even in 2013 if Serbia has come to terms with what it did in Bosnia, Croatia, or Kosovo in the 1990s.<sup>99</sup> Still, Demaçi had a point that people in the region needed to deal responsibly with their own actions—and an international trial in The Hague was too alien to contribute to that necessary goal. He was therefore reacting against over-involvement by the international community, which displaced opportunities for communities in Belgrade and Pristina to take responsibility.

A month later, as president of the Council for Tolerance and Coexistence in Pristina, Demaçi also called for the return of Serbs to Kosovo, but at the same time emphasized the importance of recognition and apology, not only at the individual level on which the Tribunal focuses, but also at collective and political levels. According to Demaçi, whether individual Serbs committed a crime or not, they needed to ask forgiveness from Albanians.<sup>100</sup> The following month, Demaçi publicly called on representatives of the new Serbian government to apologize to Kosovar Albanians for war crimes committed during the Milošević regime:

Even after three years, no politician in Serbia has tried to apologize to Kosovar Albanians for war crimes and bloodshed caused by Milošević's regime in ten years. Belgrade should make such efforts if it truly wants peace and co-existence between Serbs, Albanians and other communities in Kosovo.<sup>101</sup>

This represents, not merely a complement to the work of the Tribunal, but a radically different approach—one that the work of the Tribunal does not contribute to and may actually obstruct.

Where the states supporting the Tribunal had used aid funds to secure Serbia's cooperation, Demaçi called for returns and apologies. A further proof of the Tribunal's detachment from the lived realities of people in the region is indicated by Demaçi's time frame, which referred to changes over a decade, not the six months of the *Kosovo* phase. Along with apologies—and a trial—there is also a need for a rich and enduring historical and media record to provide a factual basis for moments of acknowledgment and reconciliation, whenever they come.

## Airing Crimes, Marginalizing Victims

### Political Expectations and Transitional Justice in Kosovo

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*Sensitivity to local political context is posited by scholars as a key element for effective transitional justice in post-conflict societies, whether it takes a judicial or nonjudicial form. This chapter makes the case for a critical reading of local political constraints, warning that framing culpability and suffering in collective terms leads to marginalization of those very victims whose crimes are being aired. The chapter compares the inability of the Milošević trial to engage Kosovar Albanians with the mixed reception in Kosovo received by the RECOM process—the regional civil society initiative aimed at documenting past crimes that emerged as a response to weaknesses in the retributive approach to past abuse. Both mechanisms falter in their encounters with the intricacies of the local context in Kosovo, where suffering is understood within a broader national struggle, both past and present. It is critical to understand from the victims’ perspective how local political constraints can be overcome by the pursuit of justice, rather than how they can be imported into the pursuit of justice.*

Why did the Milošević trial fail to engage the Albanian public in Kosovo? The reaction—really, the nonreaction—of Kosovar Albanians contradicts



the usual explanation for the ICTY's ineffectiveness in bringing about post-conflict justice in the former Yugoslavia. According to that view, many Serbs, Croats, and Bosniaks—and Albanians—have been loath to see their own co-nationals in the dock answering for acts committed in their name. Consequently, they hailed accused war criminals going to The Hague as heroes, dismissed the ICTY as biased—even as an international conspiracy—while invoking exclusively their own suffering and victimhood.<sup>1</sup> By the same token, of course, they have generally been happy to see their former opponents tried and convicted. Following this logic, we might have expected the Albanian public in Kosovo to follow closely the trial of Milošević as it aired his crimes, acknowledged Kosovar Albanians as victims, and established his culpability as the chief mastermind of their suffering. Wouldn't his trial represent the long-awaited recognition of injustice? Wouldn't the Albanians feel at least a degree of political, national, even historical rehabilitation? This is the paradox Trix tackles in her chapter: Charting Albanians' reception and perception of Milošević's trial in the Kosovar Albanian press, she concludes that they did not, and that therefore the trial was not a success.

Plausible enough, perhaps, but why? For Trix, the answer appears in what is her most important observation about the *Milošević* trial: that the voices of the victims were not heard. The trial aired Milošević's crimes, but still managed to offend his victims, not least because of their unacceptable treatment by Milošević himself in the courtroom, as well as their marginalization in the trial process. However, while interweaving evidence constituted by the expectations Albanians had for the *Milošević* trial (what they expected the trial to do) with arguments about the trial's procedural failings (what the trial did inadequately), Trix's account remains inconclusive about where the answer is to be found. Is it in the realm of politics, or is it in a procedural, legal remedy?

Such inconclusiveness leads to a paradoxical outcome. The political interpretation of the court proceedings—even if undertaken from the perspective of Albanian national narratives—marginalizes rather than redeems the actual victims. The individuals are lost in the accounts of collective suffering, for which the apparent redress lies in collective responsibility of the perpetrator through its proxy—here of Serbia through Milošević. It follows that, even if Milošević had lived to face his verdict, his victims' need for justice would not have been met. But, as we will see,

this is a dead-end street for coming to terms with past wrongs and for prospects of reconciliation. The impact of the *Milošević* trial needs to be read in the context of local political constraints in Kosovo, as Trix recognizes, but the key question is how these can be overcome *by* the pursuit of justice, rather than how they can be imported, as she seems to desire, *into* the pursuit of justice.

## I. The Limits of Retributive Justice

Trix's argument is an elaborate, if implicit, critique of retributive justice, in particular of the idea that criminal trials, at least as they are presently conducted, are effective mechanisms for reckoning with war crimes and gross human rights violations. This view has, potentially, broader applications, for although her particular critique of the *Milošević* trial is located against its reception among Albanians in Kosovo, it also needs to be read in the context of global trends in ICL. These trends have made impunity for crimes a non-option,<sup>2</sup> but also brought a number of challenges for the project of ensuring that the new default of criminal trial is also relevant and purposive. For example, the location of the Tribunal outside the post-conflict zone, with foreigners at the helm, has disempowered the local, target populations the justice project ostensibly serves. In the *Milošević* trial, the direct consequence of this has been a tin ear for local circumstances and sensitivities; even the built-in, linguistic structures of the trial—inevitable in international tribunals as they are currently designed<sup>\*</sup>—ensure that the personal experience of pain and suffering gets lost and distorted in multiple translations of witnesses' statements.

But, above all, Trix shows that trials as transitional justice instruments are not primarily victim-focused. Trials center on the perpetrator, and represent a demand not only for accountability and acknowledgment of the harms done, but also for punishment.<sup>3</sup> Within this model, the suffering of victims becomes factive, instrumental of the real purpose, which is the determination of guilt. This model produces the kind of court that can conclude its forensic examination of a massacre to its own satisfaction

with the only survivor, from the stand, declaring ““But you haven’t asked about what I went through...!””<sup>†</sup>

Trix perceives an alternative to this defective model, invoking Adem Demači’s call to Serbs to apologize for war crimes committed during Milošević’s regime.<sup>‡</sup> Although Trix, a linguist, does not use the same vocabulary, this is implicitly a call for a model of restorative justice, and so it is pertinent to ask: Could a restorative justice mechanism—such as an official apology or a truth commission—avoid some of the pitfalls of the *Milošević* trial?

## II. The Promise of Restorative Justice?

Restorative justice in transitional and post-conflict contexts refers to a range of nonjudicial tools including truth commissions, mass disqualifications, reparations, compensations, and apologies, as well as traditional informal practices. It is an approach to justice that focuses on the victims of atrocities and their needs, underpinned by a broader aspiration to restore social relations in the aftermath of past abuse.<sup>4</sup>

Producing valid truths across contexts is hard, but not impossible. The local context has to be addressed—but critically so, because it itself can stand in the way of post-conflict justice, whether pursued by judicial or nonjudicial means. Analysis of restorative alternatives shows that the role of victims is critical to overcoming the complex and ambiguous role played by the local context in transitional justice. Including victims’ voices can be an effective way to counteract the tendency towards collective framings of culpability and suffering that perpetuate a sense of injustice and grievance. Placing the victims at the center of post-conflict justice mechanisms therefore goes beyond counteracting their marginalization (itself a valuable aim). Their authentic accounts of suffering offer a point of solidarity between victims from different ethnic groups, and form a stepping-stone for direct dialogue about past wrongs, thus defying presumptions that justice can be served only via a single, collective truth.

But here we encounter the same inconclusive paradox that appears in the *Milošević* trial: Although Trix critiques the distant ICTY for being



tone-deaf to context, even a locally driven initiative confronts political problems of context and perspective. For restorative justice, just as for retributive justice, the biggest challenge is to cut through the tendency of local populations on both sides of the conflict to impose a collective interpretation of responsibility for crimes and gross human rights violations as well as for suffering.

### **A. Creating a restorative alternative: Establishment and aims of the RECOM process**

To begin answering the question of whether restorative justice offers a more responsive framework for coming to terms with past wrongs in the context of Kosovo than does the model in the *Milošević* trial, we can consider a prominent effort to create and operate a nonjudicial, restorative justice mechanism—one whose structure, procedures, and purposes might constitute a plausible test of the alternatives to formal ICL. The process of creating a Regional Commission for Establishing the Facts about War Crimes and other Serious Violations of Human Rights Violations Committed on the Territory of the Former Yugoslavia in the Period from 1991–2001, or RECOM, is a movement that has grown in direct response to the perceived weaknesses of attempts to seek redress for past wrongs through trials, especially at the ICTY. Specifically, RECOM's founders saw it as a response to the selectivity of retributive models.<sup>5</sup>

The founding of the Coalition for RECOM in October 2008 marked the beginning of a regional truth-seeking process in the Western Balkans.<sup>6</sup> The aim of the Coalition is to promote the creation of an officially recognized regional commission that would produce an accurate, objective, and official account of war crimes and other grave human rights violations during the Yugoslav wars; this, in turn, would lead to the recognition of victims and their suffering, as well as prevent repetition of the crimes.<sup>7</sup>

RECOM is also an intentionally local response to the complex post-conflict legacy in the former Yugoslavia that has been invoked as a reason for the ICTY's ineffectiveness: namely the tendency of populations to view trials as an opportunity to emphasize and exaggerate the war crimes committed by the other side, while minimizing or contextualizing one's own. RECOM is supposed to be an answer, in other words, to public



resistance to reckoning with the past, and to glorification of one's own war criminals that is coupled, curiously, with the neglect of victims.

Since the launch of the initiative, the Coalition has grown into a grassroots movement, involving over 1,818 NGOs, associations, and groups representing victims and their representatives, as well as prominent individuals, veterans, lawyers, artists, journalists, academics, and youth—from all areas of the former Yugoslavia.\* It has held hundreds of consultations at the regional, state, and local levels, and ran an initiative to collect one million signatures across the region in support of an official commission.<sup>8</sup>

Along with its innovative regional focus, RECOM is oriented toward victims. The process' remit is deliberately narrow and factive, prioritizing facts that themselves speak about the context in which the crimes were committed. Not unlike the truth-telling commissions in Latin America—such as *Nunca Mas* in Brazil, or the Argentinian and Chilean commissions<sup>9</sup>—the Coalition aims to contribute to justice by establishing truth painstakingly and building up a record, witness by witness and fact by fact. Individual victims are to be named, rather than remaining contested, faceless numbers, manipulated and obfuscated in competing ethnic narratives about the recent conflict.\* According to Lush Krasniqi, representing the families of victims from Gjakova (Đakovica) in Kosovo, “RECOM must exist so that it can be proved that there is only one truth—a real truth and to root out Albanian truth, Croatian truth, Serbian, Montenegrin, Roma, Macedonian, Bosniak, Slovenian and other truths.”<sup>10</sup> As this focus on “one truth” implies, the act of documenting also has broader aspirations that have become evident in the consultation process, such as overcoming communal and official denial of atrocity, creating a historical record, preventing violence, and encouraging reconciliation, both between and within ethnic groups.

Although the RECOM initiative is ultimately aimed at becoming a state-run project, the process of consultations has itself already become a forum for airing crimes and acknowledging the suffering of all affected by them. In Kosovo, the consultations have offered an opportunity for Albanians and Serbs to engage in a dialogue underpinned by a shared mission to establish the truth. For example, Snežana Zdravković, from *Udruženje porodica kidnapovanih i ubijenih na Kosovu i Metohiji* (the

Association of Kidnapped and Killed Persons in Kosovo and Metohija), expressed support for the Coalition “because the families of the victims thus gain an opportunity to speak about the victims publicly and openly, but to talk about my victims I ought to comprehend and understand your victims. Only then can we discuss and see our problem objectively.”<sup>11</sup> Establishing the truth about the missing was also equated with justice: As one Albanian put it, “justice could be achieved only by finding the last missing person and providing a proper funeral for the last body to be found, and only then we could be speaking of justice.”<sup>†</sup>

## **B. RECOM encounters the local context**

Alongside these promising developments, however, the debate about the RECOM process, its aims, and ultimately its reception among Kosovar Albanians, reveals the challenges of meeting expectations for transitional justice in complex post-conflict settings. Much like the *Milošević* trial, the RECOM initiative’s effectiveness and acceptability have been criticized. Although the process has supporters among ethnic Albanians, there are also sceptics and opponents among civil society groups in Kosovo. Valdete Idrizi, a member of RECOM’s Coordination Council, pointed out the need to deal with Kosovo’s context delicately because there had not been much headway in dealing with the past—in particular, a lack of dialogue between Albanian and Serbian victims’ associations, as well as between these associations and Kosovo’s government.<sup>12</sup> Similarly, representatives of the international community in Kosovo had actively discouraged efforts to establish responsibility and accountability, concerned that these might be seen by Belgrade as a provocative gesture at a time when goodwill was needed ahead of the status negotiations in 2006 and 2007.<sup>13</sup> At the Fourth Regional Forum for Transitional Justice in 2008, some Albanian victims’ associations expressed reservations toward their participation in the Coalition for RECOM, raising concerns about cooperation with other states and the time period covered by the commission’s mandate.<sup>14</sup>

The issue of missing Kosovar Albanians has cast a long shadow over RECOM’s work. Serbia’s uncooperative stance in investigating cases of the missing has been taken by some Albanians as an argument against participation in the regional initiative—that the initiative is not only premature, but constitutes outright cooperation with the perpetrator and

enemy. The intensity of this feeling that Kosovo should not cooperate with anyone, especially Serbia and its civil society, was unequivocally expressed by one Albanian NGO: “As before, the servants of Belgrade are manipulating the people, especially the families of the missing, falsely stating that the Serbian initiative is supported by most Kosovar Albanians, especially the families of victims of the recent conflict in Kosovo.”<sup>15</sup> Instead of engaging in a regional dialogue, such groups have argued that Kosovo should first start a process of reckoning with the past at the state level, spearheaded by the Kosovo government. This call for distance from a regional initiative goes to the core of Kosovar Albanians’ quest to establish their political place as a nation, whose statehood continues to be denied by Serbia, and is consistent with the tendency, which Trix observes in Kosovar Albanians, to view the *Milošević* trial through the prism of their nascent state project.

Simultaneously, the time period to be covered by RECOM proved a sticking point. RECOM’s Statute focuses on the years between 1991 and 2001—the period of open, violent conflict from Slovenia to Macedonia.<sup>16</sup> Some Albanian representatives argued that it should begin at least in 1980, the year of Tito’s death and the beginning of the unravelling of Yugoslavia. These calls were backed by references to repression in Kosovo during Communist rule and, in particular, abuse of Albanian recruits in the JNA in the 1980s and 1990s. One discussant said, “Here in Kosovo we have cases when our youths went to serve the army, and returned as corpses.”<sup>17</sup> Others singled out the early 1990s—which, although not a period of armed conflict in Kosovo, saw unrelenting state repression under Milošević’s rule—when many Albanians were murdered, tortured, or subjected to political and staged trials.<sup>18</sup> For many Albanians, this period was a prologue to the armed conflict in 1998 and 1999, and essential to understanding it. Much as in the *Milošević* trial, the sense that context was stripped away has been a source of dissatisfaction with and a basis for resistance to the RECOM initiative. Indeed, the critics of RECOM throughout the former Yugoslavia argue that the establishment of political responsibility for the war is a precondition for establishing the truth, in contrast to RECOM’s approach of focusing on the facts of past abuse first.<sup>19</sup>

At the same time—and unlike the *Milošević* trial—the RECOM initiative’s focus on the needs of the victims and their families for truth



and justice has assured it a measure of grassroots support. It reverses the methodology of trials that, as Trix shows, bury the harrowing statements by survivors of atrocities and relatives of victims in the background—just as it challenges their sidelining in all post-Yugoslav states. This includes Kosovo, where victims have complained about the government’s indifference to them, a sense of neglect by Kosovo’s society and institutions that one Albanian woman expressed, saying “We have been stripped of our dignity; so far we do not feel part of Kosovo society.”<sup>20</sup> Despite opposition from some Albanian associations and think tanks, the signature initiative has demonstrated significantly greater support for RECOM in Kosovo than in any other state in the former Yugoslavia.\* Still, this evidence of partial popular support only makes the question of opposition to an initiative focused on the victims and spearheaded by local organizations even more pertinent.

### **III. Back to the Map: Beyond the Mechanisms of Transitional Justice**

The experience of RECOM so far suggests that—quite apart from questions of its ultimate efficacy—the process has met a mixed reception in Kosovo. RECOM was deliberately designed in reaction to critiques of the ICTY—a paradigmatic example of international retributive justice whose unfolding is removed from the local setting—but even this bottom-up, restorative justice initiative, exclusively shaped by local actors driven by an imperative to respond to victims’ needs, has met resistance predicated on very similar objections. How can we explain this?

The most important consideration in pursuing transitional justice is the context, with all its social, historical, cultural, and political particularities.<sup>21</sup> The observation that transitional justice is “constituted by, and constitutive of, the transition”<sup>22</sup> reminds us to focus on the political environment that shapes the reception and perception of efforts aimed at coming to terms with past crimes. Formal mechanisms will not have their desired effect if they do not accommodate, respond to, or consciously aim to change that environment. In Kosovo, the introduction of transitional justice processes—whether international or local—has



taken place in an environment marked by the legacy of a Communist regime and conflict. In particular, three aspects of Kosovo's complex transformation comprise a challenge to any transitional justice mechanism: They concern the complex history of crimes in relation to Kosovo's political transformation, the continuing national struggle, and victims' position in narratives of conflict.

The maps of crime are complex. The legacy of crimes passed on to the post-conflict authorities in Kosovo has historical, ethnic, and ideological dimensions. Given the history of Albanian–Serb relations in Kosovo—which both sides see as a history of domination by one group over the other<sup>23</sup>—efforts to reckon with war crimes have an explicit inter-ethnic dimension. However, as many Albanians' response to Bakalli's testimony in the *Milošević* trial demonstrates, reckoning also has intra-ethnic and ideological dimensions. Kosovar Albanians' perception of their own former Communist leaders is closely intertwined with perceptions of their cooptation in the Serb project of domination. Communism waned swiftly in Kosovo in the late 1980s as Milošević began his ascent to power through a forceful abolition of Kosovo's autonomy. Nonetheless, Kosovar Albanian Communists' alignment with the Albanian national movement in Kosovo did not dispel their ambiguous standing in the Albanian community: They were seen on the one hand, as modernizers who spearheaded Kosovo's political, economic, and even national development, crowned by its provincial status in the 1974 constitution, but on the other hand, as Communist cronies who subscribed to the Serbian vision for Kosovo, especially after their participation in the violent suppression of the 1981 demonstrations that voiced Albanians' demand for republican status.

Second, the temporal and political context in which a transitional justice instrument, whether retributive or restorative, is introduced may ultimately prove defining for its impact. Kosovo's political status has been contested during the entire period that the ICTY and RECOM have been operating. Kosovo's declaration of independence on 17 February 2008—the fulfilment of its ethnic Albanians' historical striving for national sovereignty since the region's incorporation into Serbia in 1912—aimed to end the ambiguous position Kosovo had found itself in since the adoption of Resolution 1244. However, although Kosovar Albanians and the majority of West European states consider the question of the status of

Kosovo settled, the European Union is unable to agree on a recognition policy; just over half of UN members have yet to recognize the new state, which is left outside most international institutions.<sup>24</sup> Above all, Serbia's refusal to recognize Kosovo has prevented closure of the Serbian–Albanian dispute. Most notably, in the north, run by Serbs loyal to Belgrade, Pristina has yet to impose “empirical sovereignty,” understood as effective exercise of attributes of statehood.<sup>25</sup>

Such continued contestation means that all crimes are interpreted, and all victims perceived, within the context of this struggle; this is as true for the ongoing RECOM initiative as it was for the terminated *Milošević* trial. Rugova's statements following his testimony in the ICTY in 2002 show this linkage between Kosovo's victims—between the ostensible forensic purpose of the trial—and Kosovar Albanians' political quest for independence is explicit.\* Even after Kosovo's declaration of independence, an analogous linkage helps explain opposition to participation in the RECOM initiative, despite its notional focus on local concerns and its attention to victims. Victims are not simply people, but factors in a national project—sacrifices: Marking the official Day of the Missing by a visit to a *Lëndinë e Pikëllimit* (Field of Grief) in the village of Meja, near Gjakova, in April 2011, to commemorate Albanian victims of Serb violence, the newly elected president of Kosovo, Atifete Jahjaga, declared that “[t]he freedom and independence of Kosovo is owed to these martyrs who have sacrificed themselves so that Kosovo is governed by its people, that Kosovo will have democratic institutions and that Kosovo will be an equal and dignified country in the European Union.”<sup>26</sup> In such a hotly disputed political context, transitional justice becomes another site at which national struggle unfolds, rather than first and foremost serving the victims.

Asserting victimhood as a collective appropriation allows only one side—one's own side—to be the victim, whereas the other is always and only a perpetrator, never a victim.\* At the same time, the fact that victims occupy such a place in the national project has made it difficult to acknowledge individual victims on all sides and their particular suffering. In this way, “denial of the victims is more ideologically rooted in historically interminable narratives of blaming the other.”<sup>27</sup> As a consequence, Kosovo's victims—of all ethnicities, but especially

Albanians and Serbs—are in a paradoxical situation: They are acknowledged by their own communities, but simultaneously are subsumed in an exclusive collective claim to suffering expressed as opposition to the ethnic other, and by accompanying narratives of conflict.

Logically, reckoning with the past at the inter-ethnic level ought to start with de-collectivization of blame, without denying the scope of complicity in crime. However, reckoning with the past also has a critical intra-ethnic side: “Intragroup reconciliation means a group comes to terms with its own history and culture, which may have been based on enmity, war thinking or a fixation on its ‘victimization’ or inherent ‘superiority.’”<sup>28</sup> In Serbia’s case, this requires the reevaluation of its mythic history centred on Kosovo, not just to come to terms with the loss of Kosovo,<sup>29</sup> but to come to terms with the crimes committed in the name of the Serbian nation—the kind of reckoning Demaçi envisions. For Kosovo, this requires the recognition of discordant voices that question a master narrative of a KLA-led struggle for the liberation of Kosovo built on incorporating individual victims in a mythic collective martyrdom.<sup>30</sup> If it overlooks these complex histories—including their internal complexities—the pursuit of transitional justice may further entrench the sense of victimization steeped in the past, rather than recognizing victims as a way of overcoming that past.

In Kosovo, the complex political and historical context, including the unfolding double transition from Communism and from conflict, provides us some insight into why transitional justice initiatives—whether judicial or nonjudicial, retributive or restorative—have left victims unsatisfied. The fear and trauma engendered during Kosovo’s protracted transition and conflict, compounded by the perceived indifference of its governing institutions and their cooptation as a collective symbol within the national project of Kosovo, ultimately has made individuals feel doubtful, anxious, and insecure about dealing with the past, while simultaneously leading them to take on an “only-victim-role[.]”<sup>31</sup> This, in turn, has affected efforts to reckon with the past.

Thus the *Milošević* trial played into the collective nationalism in which the issue of war crimes in Kosovo was framed by political elites, both in Kosovo and in Serbia.<sup>†</sup> Consequently, it helped close off whatever possibility might have existed for a cross-ethnic debate on crimes and



violations of human rights. This politicization of the trial was aided by the sidelining of victims and their testimonies in the legal process, contributing to its perceived failure in Kosovo, as well as further marginalizing victims and their suffering.

Similar challenges confront the ongoing RECOM process in Kosovo. Although it is organized on radically different principles than the ICTY, and seeks to draw its legitimacy from explicitly local sources, the RECOM process has not thereby escaped the pitfalls of context and politics. These challenges do not doom the initiative, or similar efforts. Precisely because RECOM aims to afford victims and their families space to reclaim their individual stories of pain and suffering, it holds the promise of a nascent dialogue between Kosovo's polarized Albanian and non-Albanian communities, essential for mutual solidarity and understanding<sup>32</sup> and as a precursor to establishing truth and justice. But to be successful, RECOM—indeed any transitional justice initiative—will also need to confront and overcome the many incentives, born of politics and history, to treat victims as something else.

## **IV. Victims above Politics: Doing Justice while Avoiding the Collectivist Trap**

This returns us to the paradox we noted at the outset, which has to do with whether the remedies for the flaws of the *Milošević* trial are legal and procedural in nature, or political. We have seen that neither retributive nor restorative justice mechanisms deployed in response to the conflict in Kosovo have been immune to criticism from the very stakeholders those mechanisms were meant to serve, and that this criticism has a common source: For both types—the ICTY's *Milošević* trial and the RECOM process—the context in which transitional justice unfolds has been critical in explaining its reception. That context has been one of complex, highly varied experiences of suffering set against a transformation that cuts across ethnic cleavages. If a primary aim of transitional justice is to take account of the needs of the victims, in all their diversity and with their varied understandings of truth and interest in redress for past wrongs, the evidence mobilized to mount a critique ought to receive particular



attention. It ought to take into account the fact that political expectations for transitional justice may not coincide with victims' needs for truth and justice.

This is why Trix's deployment—really, her conflation—of evidence derived from Albanians' expectations for the trial and evidence derived from analysis of the trial proceedings to explain why Milošević's trial failed to interest Albanians in Kosovo falls short of answering the question of how the victims of crime can be properly respected and accommodated.

In fact, Trix's explanation comes very close to prescribing as a solution precisely what had been, in the *Milošević* trial, the key obstacle to establishing the truth: Her solution is, implicitly, a collective one. In Trix's account, Kosovo's Albanians were dissatisfied with the trial because it did not reflect the collective and historical nature of Serbian culpability. Ironically, this framing of the *Milošević* trial's ineffectiveness undermines her key finding concerning the value of oral testimonies of individual victims. Victims ought to be heard not to reinforce but precisely to challenge collective understanding of culpability and suffering—above all, this is the transformative potential of transitional justice. Otherwise, as long as issues of responsibility and culpability are presented in collective terms, criminals, as named individuals, will effectively be able to hide in plain sight, amid the conceptual and discursive obfuscation of categories such as nation and society. Indeed, as several other chapters show, Milošević himself, while sitting in the dock in The Hague wearing a tricolor tie to match the Serbian flag, was at pains to show that it is not only him, but the entire Serbian nation, on trial. He was fully aware that the only way for him to defend and legitimate his policies and their consequences was to reach out to and represent—again as he had effectively done during his rise to power—the nation.

Human suffering is not monolithic, and injustice visits us in many forms. For this reason, transitional justice, properly understood, is not monolithic either, but rather is characterized by a search for effective and legitimate ways to account for the legacies of injustice. There are many possible avenues, and no single transitional justice instrument can give a full accounting of complex histories of crime—Kosovo is an illustrative example of this principle. Indeed, this aspect of transitional justice is indirectly indicated by the multiplication of transitional justice instruments.<sup>33</sup> Still, for all their complexity, one common, critical factor

in designing and implementing transitional justice mechanisms is an awareness of the context in which they are pursued.

But awareness is not the same as acquiescence or advocacy, and requires a critical examination of that local context. Merely responding to local politics—especially a politics that marginalizes the victims themselves—may not actually help the victims in their quest for truth and justice, as in Kosovo it appears not to have. Victims need to be the agents of their own, rather than some national truth. Giving more voice to victims, whether in trials or in truth commissions, must be integral to any strategy to obtain post-conflict justice. Ironically, cutting out their voices in the *Milošević* trial actually (and perhaps incidentally) did register within Kosovo's local context—but with the wrong kind of local politics, one that sees victims as means rather than ends in a quest for justice, itself used instrumentally for political ends.

## Framing the Trial of the Century

Influences of, and on, International Media

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*The Milošević trial was described in specific, patterned ways by journalists accredited to the Tribunal. Applying the concept of framing used in content analysis, the chapter shows how journalists covering the trial preferred certain details, facts, and opinions to others in an effort to construct coherent narratives from a plethora of diverging and often contradictory information. In part, these efforts, and the dilemmas they presented to journalists covering Milošević, arose from specific external and professional constraints, including the overall political framework in which the trial took place. However, these external constraints played only a minor role in shaping coverage of the trial, because the decisive framing criteria had been already been established and were largely dependent on the political and ideological orientation of the journalist's media outlet, rather than on the development of the trial itself or the course of events in the courtroom. The longer the trial lasted, the more negative the coverage of the ICTY became. Part of the declining media support for the trial can be attributed to the Tribunal's reluctant and incoherent media policy, the dominance of the Prosecution in media relations, the late launch of outreach programs, and the Prosecution's abandonment of an active rather than reactive media policy. The Prosecution and the Tribunal as a whole could have initiated a more favorable media frame for the*

*Milošević trial—one more consistent with the ICTY's mandate; still, many of the factors that could have influenced media coverage of the trial were far beyond the Tribunal's reach.*

## **I. From Enthusiasm to Frustration: *Milošević* and the ICTY's Declining Public Image**

12 February 2002 should have been a day of triumph for international criminal justice and particularly for the ICTY. For years, its prosecutors and judges had been waiting for a big fish to be delivered. During the Tribunal's early years, they had been fighting against diplomats and politicians who (as Bassiouni argues) saw the ICTY as a stumbling block on the road to a fragile peace in the Balkans, as well as criticisms that the early trials had focused on relatively minor figures, such as *Tadić* and *Dokmanović*. Then, the political pendulum had swung: prominent, high-ranking suspects such as Biljana Plavšić and General Radislav Krstić had pled or gone on trial. Now Milošević himself—the most powerful figure ever indicted by the ICTY—had been arrested and transferred to the Tribunal. After several pretrial hearings, he now appeared in court for trial—defiant, self-confident, and belligerent, but there.

So enormous was media interest that the press office of the ICTY issued special accreditations and had tents set up outside the Tribunal premises to accommodate all the journalists and television teams. The majority of them had to watch the proceedings on a huge screen, more or less as they could have done at home using the Tribunal's webcast. But staying at home was no alternative. In the opinion of most journalists present during those days—including me—history was being made in that place and justice was being done. “Will Milosevic Get His?[,]” *Time* asked in a report written by four correspondents who had traveled to The Hague:

When case IT-02-54 finally opens at the International War Crimes Tribunal in The Hague this week, it will mark a moment many despaired would never come. The Serb strongman and former president of Yugoslavia, who presided over a decade of mass murder and mayhem across the Balkans seemed untouchable for so long, and then became almost forgotten as the world's attention fixed on a new global villain. Yet Slobodan Milosevic will now have to sit each day in a well-lit U.N. courtroom, flanked



by two guards, to answer to charges of crimes against humanity—even if he does remain as defiant as ever.<sup>1</sup>

The mixture of satisfaction, glee, and triumph that emerges from *Time*'s report marked the majority of West European and U.S. media commentary from the start of the *Milošević* trial. Only rarely was this trend disturbed by voices from Serbia or the small international community of Milošević's self-appointed defenders, whose inconsistent criticisms of the proceedings hardly ever persuaded anyone outside their own ranks.

For the ICTY's public image, the *Milošević* trial was a crucial opportunity. No other trial attracted such crowds of journalists, drew so many citizens of the former Yugoslavia to their TV screens, or aroused so many controversies. But what initially appeared to be a great success quickly turned into a public relations disaster for the Tribunal. Attitudes toward Milošević remained stable across time, but the picture of the ICTY changed, and declined, the longer the trial lasted. With time, even many of the media outlets most in favor of the Tribunal no longer expected a victory for justice or even a fair verdict—at least, they no longer wrote about those things. If they still published articles about the trial at all, they focused on the Prosecution's inability to present its case convincingly, on Prosecution witnesses who ended up bolstering the case for the Accused, and finally even on conflicts within the Prosecution team.

By the time Milošević's dead body was found in the Scheveningen detention facility four years later, frustration about the Tribunal's performance, disillusionment with the length of the proceedings, and despair about the lack of transparency in the Prosecution's strategy characterized the dominant current in media coverage. By then, the focus of media reports about the “trial of the century”<sup>2</sup> had shifted from praise for prosecutors to disdain for overwhelmed judges and a kind of trial fatigue—a disappointment with the lack of any possibility to squeeze a straight narrative out of the opaque debates in Courtroom I.<sup>3</sup>

By the end, there was nothing left from the triumphant support the Tribunal had enjoyed in 2002. Back then, the largest and most influential German news magazine, *Der Spiegel*, had published a large report about the “planet of the good people[,]” a Manichean picture contrasting sensitive, hard-working prosecutors and poor, pitiful, but proud and determined witnesses—all presented as victims—on one hand with evil,

grinning, and defiant war criminals on the other.<sup>4</sup> In January 2005, the same magazine printed a large interview with former ICTY judge Wolfgang Schomburg, who complained about the “errors of the prosecutors, the lack of evidence and unjust verdicts” at the ICTY.<sup>5</sup> In other outlets, perplexity and frustration gained ground: The trial had become a “scheduling nightmare” for the Prosecution and “the longest trial before an international court[;].”<sup>6</sup> In an interview in November 2005, Misha Glenny emphasized the perverse, counterproductive impact of the *Milošević* trial on public opinion in Serbia and Croatia.<sup>7</sup>

Above all, the media lost interest. Although the accreditations and the crowds were back, briefly, to cover Milošević’s death, between summer 2002 and 2006, Courtroom I emptied. Journalists refocused on their other regional briefs—Dutch politics, the *Dutroux* trial in Belgium, the European Union, and NATO\*—or went back to business as usual in their home offices; *Time* was hardly going to keep four correspondents in The Hague to cover a seemingly endless trial or the institution conducting it. Still, mere neglect—the rush of other events and the pressure of the news cycle—could explain a lack of coverage, but not the shift to negative frames.

The harm, or perception of harm, engendered by *Milošević* outlasted even that long trial. In summer 2008, when Radovan Karadžić, one of the few suspects then still at large, was finally arrested in Belgrade and transferred to the ICTY, the *Washington Post*’s article neither hailed another victory in the fight against impunity nor a success of the international community in doing justice. Instead, the headline read “Karadzic Case Offers Court a Chance to Repair Its Image.”<sup>8</sup> The newspaper quoted unnamed sources calling Karadžić’s arrest “a shot at redemption for the huge and costly international court that will try him[;]” and reminded the reader that the ICTY had already “stumbled in prosecution of Milošević[.]”<sup>9</sup> Evidently the *Post*’s main concern was not if Karadžić would be tried decently; instead, remembering its disenchantment with *Milošević*, it worried if the ICTY would be able to live up to this new challenge.

Why had coverage of the *Milošević* trial—originally so positive and hopeful—come to focus on these failings? Journalists have tended to answer this kind of question by claiming that they are simply describing

events, persons, and things the way they were; from this perspective, coverage of the *Milošević* trial turned negative because the trial itself went out of control. However, such an approach presents journalists as totally independent and objective actors, and detaches the processes of reporting, editing, and commenting from wider constraints—societal moods, ideologies, and economic interests—that in fact shape the media and the way they deal with information. No matter how the trial actually unfolded, the media could have chosen to paint a more positive or more negative picture of the ICTY than they actually did.

This chapter identifies the factors that contributed to the deterioration of the ICTY's public image during the *Milošević* trial—and to the choices that media outlets, guided by those factors, made. It relies on the concept of framing—an analytical perspective that compares the ways in which specific events are contextualized and interpreted by media outlets. We can identify two dominant frames in the media coverage of *Milošević*. One, which fundamentally supported international criminal law and its prevalence over municipal law, we will call “pro-ICL.” This frame was deployed by most Western, liberal-democratic media outlets, as well as some in the former Yugoslavia. Opposed to this tendency were frames used by nationalist media from the former Yugoslavia and some radical left-wing outlets from Western Europe, which promoted national sovereignty rather than international law; these we will call “anti-ICL.”\*

The rest of the chapter focuses on the frame adopted by pro-ICL media outlets and discusses the reasons for their shift towards negativity and disenchantment, including the strategies different actors employed to influence these media frames and their efficacy in shaping media coverage. By disentangling the structural and legal constraints on the Tribunal's (and especially the Prosecution's) media policy from those institutions' internal shortcomings and decision-making deficiencies, we will see that the ICTY and the Prosecution could have prevented the decline of their image in the media only at the margins. Many factors that influenced the increasingly negative media coverage of the ICTY arose out of institutional constraints within the ICTY, and out of the tension between the Prosecution's juridical tasks and the expectations of the public.



## II. Not Just the Facts: Framing the *Milošević* Trial

Consumers of media tend to evaluate news and opinions by asking if they are consistent with established facts and common knowledge—asking, in other words, if they are true. Analysts of the media take a very different approach: Rather than assume that reporting is necessarily derived from (and best measured against) some prior, objective, and univariate reality, they ask why certain media describe things in one way while other media do so in a different way. It is the basic assumption of this approach that every media outlet and every reporter can choose from a multitude of options when they decide to present a specific issue.

Through the very act of writing about an issue, media draw upon and refer to cognitive schemes, called “frames,” which provide categories, order, and chronology; these in turn allow the reader (and author) to organize fragmented information and attribute meaning to it. By emphasizing certain aspects of an event and embedding its description in a conventional format—headlines; pictures; the structure of a page, a film, or a radio program—media instruct us both what to think, and how to think about it.<sup>10</sup> Such frames act as patterns of interpretation that affect problem definition, moral evaluation, and causal interpretation, and may even imply particular solutions for the identified problem. Viewed through this lens, journalism appears as a far more discretionary and constructed exercise than the popular or professional image of journalism as merely reporting facts.

Applied to our case, for instance, the event of Milošević’s transfer to the Tribunal could be described as a technical judicial process, an act of abduction of a once popular politician by a ruthless regime, a victory for international justice, a personal satisfaction for Carla Del Ponte, the end of Milošević’s political career, or in many other ways.<sup>11</sup> Each of these frames potentially contradicts other frames, though each may also overlap with others. All these frames have features in common: Each is an attempt to tell a story, to attribute meaning to the events and to place them into larger narratives—how Serbia is allegedly subjugated and victimized by the West, say, or how the ICTY manages to enforce its policy in Serbia, or how international criminal justice progresses.

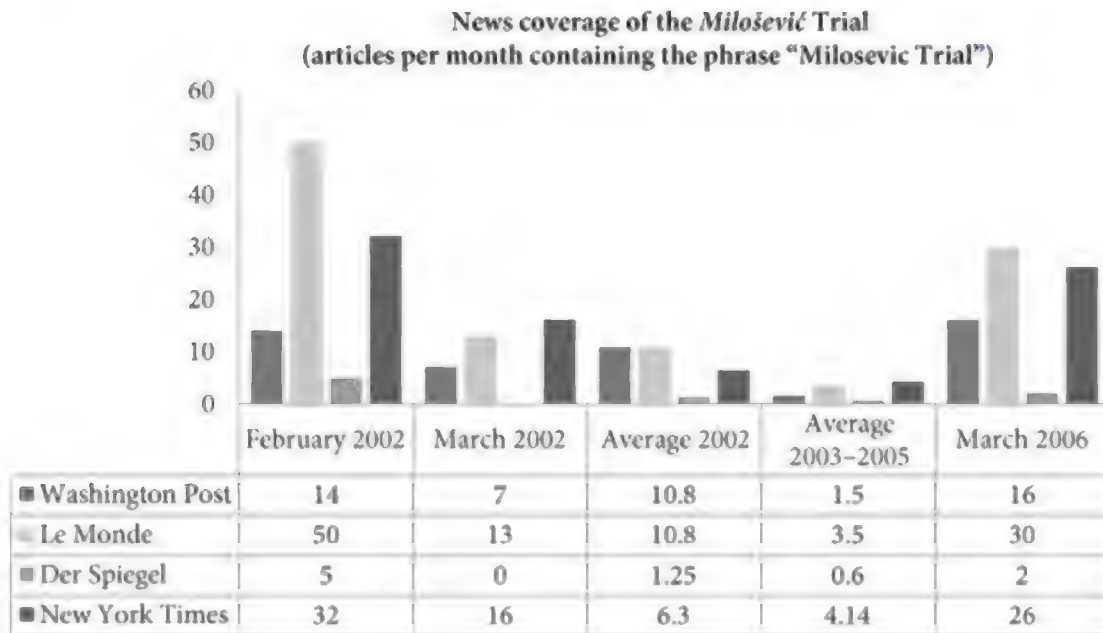


For this exercise in framing to function, certain conditions must be present. An overarching narrative must be available, into which the respective frame can be embedded; also, the event to be framed must possess certain features that allow journalists to ascribe meaning to it and to interpret it normatively.\* Although there is considerable flexibility in relating events to narratives, events that lack these conditions tend to be neglected by journalists. The same is true for events that do not lend themselves to consistent moral judgment.

And here we see the initial problem that confronted media coverage of the *Milošević* trial, which, even at the outset, was expected to be long. The problem with the *Milošević* trial—as with any trial—was that it was much easier to impose a clear frame at the start than to follow that frame across four years of hearings. When the trial started, the dominant frame the media used—that is, what we are calling the pro-ICL media, which were the great majority at the time, apart from some segments of the Serbian media and Milošević’s few supporters—was almost uniform: An autocratic ruler from Serbia who had instigated war, atrocities, and crimes was finally brought to the ICTY to face his guilt and to be severely judged and punished by international, impartial, and competent judges. Skepticism was almost absent in early reports and commentary, and the focus of most reporters was on Milošević’s behavior, though in ways that implicitly accepted and reinforced the broader pro-ICL frame: Would he defy the court, would he comply with its rules, would he defend himself or resort to legal counsel, would he conduct a political or legal defense—would he, perhaps, even refuse to take part in the proceedings?<sup>12</sup> This general frame was, potentially, consistent with any foreseeable behavior by the Accused: Even if Milošević had complied completely, pled guilty, expressed remorse, and asked for a lenient sentence, the pretrial frame about an autocratic villain facing justice could have been used in order to tell that story—and even develop it as the conversion of a sinner into a remorseful prisoner who admits his guilt.

But soon after the first confrontation between “the iron lady”<sup>13</sup> from Switzerland and “the butcher of the Balkans,”<sup>14</sup> the trial dove into historical details and procedural controversies, which could hardly be pressed into a clear normative frame. It very much complicated the task of the journalist, as it was less and less possible to convey the trial as a

contest between a good Tribunal and an evil Accused. Media interest plummeted immediately after the initial days of the trial:\*



The ups and downs leave little room for doubt: After huge interest in the trial, news coverage by the three outlets decreased and remained at a low level throughout 2002, then declined even further in the period between 2003 and 2005. The spike in March 2006 reflected coverage of Milošević’s death, the controversies about the possible causes of his demise, reactions of the Serbian public, and the funeral. There were minor peaks during the intervening four years: for example, coverage in the *Washington Post* and the *New York Times* increased in December 2003, when General Wesley Clark appeared as a Prosecution witness; *Le Monde* dedicated more space to the trial when Paddy Ashdown confronted Milošević; and coverage in *Le Monde* and *Der Spiegel* increased when, in May and June 2002, Ibrahim Rugova testified against Milošević and details of the events in Račak were discussed for several weeks.\* All four outlets almost totally ignored Milošević’s defense, which started in early 2004.

During the first weeks, the appearance of witnesses testifying about the crime base in Kosovo enabled the remaining journalists—already far fewer in number—to frame the proceeding as a duel between a once powerful and still belligerent, intimidating, and self-confident ruler and

poor, often illiterate villager-victims.<sup>15</sup> At first, these witnesses provided drama for news reports by adding emotion and anecdote to the detached atmosphere of the procedures behind the bulletproof window that separated the audience from the courtroom. But after several days, repetition deprived their stories of any news value, and increasingly highlighted the inevitable structural tension between the requirements of court procedure and the business of journalism: Lawyers need to go deep into the details and to evaluate them from specific, purposive perspectives, whereas journalists need new developments, sudden changes, and surprises in order to maintain the attention of their readers. A touching story about cruelty and infamy, told by an angry, desperate Kosovar villager persecuted by Serb paramilitaries, is a perfect story for a day; it loses its appeal when analyzed for hours and days in the courtroom, or when told in more or less the same way by an endless number of other witnesses. When Milošević, in turn, engaged in endless disputes about the causes of destruction in Kosovo and whether the damage was a consequence of ethnic cleansing or of NATO bombing—a question of tremendous legal consequence but not a matter even at issue in the dominant frame—journalists turned their back on Courtroom I.

### **III. Internal and Professional Factors Influencing Pro-ICL Media Frames**

There is a scenario well-known to any freelancer, stringer, or foreign correspondent who finds himself in a situation that is suddenly the focus of events of high political salience. Large media corporations and wealthy editorial offices immediately send out their star reporters and teams of investigators and writers, who—if only for a short period—totally dominate reporting from the site, marginalizing correspondents already on the scene who may have been reporting on that country or situation for years. This mechanism has important consequences for media framing, because there are patterned differences of perspective and interest between special envoys—sometimes known in the trade as “parachutists”—and permanent correspondents.



The same happened when the *Milošević* trial started: Many long-time observers at the ICTY were sidelined by colleagues who were sent by their home office. During the initial phase of the trial, therefore, the narrative framing was dominated by journalists who had come to The Hague just for the opening and who left after a few days or weeks. These short-term reporters—often prominent or well-known correspondents—were perfectly able to present the story of the trial in dramatic and moral terms, fit to a frame that, necessarily, they had brought with them, ready to use, and which there was in practice little time or opportunity to test against the realities of the trial.<sup>16</sup> During the months that followed, however, these initial frames were slowly but steadily changed by the contributions of long-term correspondents—news agency reporters, stringers for the big magazines and dailies, and correspondents based in The Hague—who were responsible for the follow-up, and who in effect determined and eventually shifted the ICTY's public image after the crowds had left.

The permanent correspondents at the ICTY usually had deeper insight into and more detailed knowledge of the ICTY's work than colleagues sent in on short-term assignment. This is not to say that greater knowledge necessarily correlated with a critical view—indeed, as we will see later, the permanent correspondents were in fact quite isolated from the Prosecution's inner workings—but instead, this matters in how it relates to the preexisting pro-ICL frame. Because of their sustained interaction with the trial and Tribunal, the permanent correspondents were challenged to confront the relationship between their detailed observations and the broader narratives about the ICTY, Milošević, and the trial over time in a way the parachutists were not.\* Permanent correspondents often—though not always—had difficulties matching their own observations at the ICTY with broader claims about justice and truth, and concluded that large parts of the court proceedings did not comply with these claims.

Permanence had another effect on the nature of reporting: Correspondents whose principal work was occupied with the Tribunal began to report about other trials that ran parallel to the *Milošević* sessions; others started to look into the legal and procedural details of the trial process. During the months and years after February 2002, many of these remaining journalists started to analyze the legal and diplomatic framework in which the Tribunal operated; some even managed to get access to insider knowledge.



In general, the permanent correspondents' views on the ICTY were more critical than those of the parachutists. The differences between their institutional positions, and the mechanisms that regulated their different levels of participation in reporting on the trial, go some way in explaining the shift in the coverage of the ICTY after the initial phase of the *Milošević* trial. The special envoys' media frames were generally more positive for the ICTY than the picture permanent correspondents drew, and so long as the envoys were on the scene, their views dominated, but these could not be sustained in the absence of ongoing reporting, and after several days were replaced again by the less emphatic frames of the permanent correspondents.

Over time, these changes became apparent in published reporting, but there was a lag. Private debates among the permanent correspondents often reflected these doubts much more than the articles and reports they were publishing at the time. This may have been due to the interference of their central offices or correspondents' *ex ante* compliance with perceived expectations about what the central office would accept. A permanent correspondent acts as the agent of his principal in the home office, but also wields some power to set the reporting agenda: A correspondent can (and often is expected to) propose topics. This agenda-setting power is constrained: When many other media (especially competitors) pick up a specific topic, the correspondent has to pick it up, too; the same is true when his home office decides that a certain topic should be dealt with because of its salience for readers or the particular preferences and interests of the editor or publisher—and home office editors can reject correspondents' proposals for stories. The abilities of correspondent and home offices to set agendas are also exposed to different influences and constituencies; the correspondent has to anticipate the expectations of his home office and readership, but also the reactions of his local interlocutors and peers, and this may lead him to make different choices about what to write.\*

During the *Milošević* trial, this led to differences between frames used by permanent correspondents from pro-ICL media—which often exposed details about trial procedures and incidents surrounding the trial that were potentially disadvantageous for the ICTY's public image—and those used by occasional visitors from the home desk and desk officers writing comments back home, which mostly neglected details and emphasized the

ICTY's noble mission of doing justice. For many of the correspondents dealing with the everyday troubles and problems of the ICTY, what was most important was *how* justice was being done; for the desk writers in the home offices, these were details, which could not blur the main message that justice *was being* done.

This critical shift was not occurring in isolation: The aspects of the trial that increasingly evoked journalists' suspicion did not differ very much from the substantive legal controversies that began to appear in specialist journals and that were sometimes expressed in interviews by defense counselors, *amici curiae*, and legal experts in the ICL and human rights communities.<sup>17</sup> Would the Prosecution be able to link Milošević to crimes committed by forces acting beyond the scope of his constitutional powers? Was its reliance on a JCE a risky, even improper, attempt to criminalize the political objective of a Greater Serbia? Had the Prosecution included so many counts in the indictment in order to “shoot game with a machine gun,” hoping that at least some bullets would hit?<sup>18</sup> Had it failed to produce a legally compelling case on the politically and emotionally charged genocide counts? Had the Chamber given Milošević too much control over the trial, or made a mistake in letting him represent himself?\*

In some sense, we might suppose that increasingly negative coverage was simply a function of these problems—an example of just reporting the facts. Yet these problems had not appeared for the first time in this case, and it would be simplistic to blame bad trial management alone for shifting perceptions of *Milošević* and the deterioration in the ICTY's public image. It is hardly contested that the trial process had serious defects, but even this would not have necessarily prevented journalists from framing the trial as a fight between righteous prosecutors and truth-seeking judges on the one hand, and an arrogant, defiant perpetrator on the other.

Nor did the media's increasingly negative attitude toward the Tribunal spring from an improved opinion of Milošević. The picture the media painted of the former head of state had been fixed long before, and the trial did little to change it: Milošević was an evildoer, and it was impossible to dissociate his political responsibility from his formal criminal liability without obscuring the clarity of that frame. This was a

general tendency; as one veteran journalist noted, “Many reports flatly call detainees war criminals.”<sup>19</sup> Surprise about Milošević’s unexpected ability to manipulate proceedings, intimidate witnesses, delay the trial, and turn Prosecution witnesses to his advantage was probably the only grudgingly positive element of his image during the trial, and even that faded away with his death.

Indeed, if anything, the termination of the trial changed the media’s presentation of Milošević for the worse. Some media outlets had chosen to present the trial with a certain distance, semantically maintaining the presumption of innocence through neutral terms such as “the accused” or by adding “allegedly” when describing the counts of the indictment. With Milošević’s death, however, many media outlets effectively abandoned the pretense of a presumption, reverting to a nonlegal frame of moral certainty. The BBC’s Belgrade correspondent, Alan Little, evidently felt released from legalist constraints when he introduced his report on Milošević’s death:

Slobodan Milošević is like a character written by Goethe. The arc of his life, his rise and fall, is Faustian. He made a pact with the twin demons of Balkan nationalism and war. The demons propelled him to power and, for a while, kept him there. But he lost control of them, and they destroyed him in the end.<sup>20</sup>

Australia’s *The Mercury* was more prosaic and much more accusatory; in an article titled “Butcher’s Bailout. Slobodan Milošević Dies as Trial Nears End[;]” the newspaper’s editors deplored that, by dying, “‘the butcher of the Balkans’ had escaped justice.”<sup>21</sup> Even *The Economist*, which had consistently adopted the presumption of innocence in its articles about the trial, was now similarly blatant: “The ‘Butcher of Belgrade’ cheats justice through death.”<sup>22</sup>

What had changed was not pro-ICL journalists’ attitude toward Milošević—whom they still framed as a bullying, overconfident tyrant who was morally and factually culpable—but toward the ICTY itself. What had been a frame about a good Tribunal, brave and courageous prosecutors, and neutral, severe, and rigorous judges now had become a much more complex narrative about ill-advised, confused prosecutors and overwhelmed, helpless judges, who were manipulated by a skilled but ruthless Accused. What remained was the impression that the “trial of the



century,” which had been awaited for such a long time by the ICTY, had produced a legal and procedural quagmire that left the question of guilt—so obvious in fact—unanswered in law.

### **A. Particular effects on journalists from the former Yugoslavia**

These differences in interest and perspective between permanent correspondents, special envoys, and home offices were also relevant for the media from the former Yugoslavia—which we will also call “Yugoslav media” for convenience—that covered the *Milošević* trial, whether they adopted a pro- or anti-ICL frame. But due to the specific obstacles that these reporters faced in The Hague, this asymmetry between agents’ and principals’ expectations had different consequences for the ICTY’s public image in Yugoslav media than it had in Western media. Due to the visa and residency restrictions imposed by the Dutch authorities, and the high relative cost, after the initial days of the *Milošević* trial most anti-ICL media from the former Yugoslavia covered the trial from their desks or from offices in Brussels.\* This gap in wealth and access dividing Western and Yugoslav media meant, perversely, that those with the highest interest in the trial were relatively less able to cover it in a comprehensive and sustained manner.

This absence, in turn, had a knock-on effect, because one of the most important influences on reporting comes from group pressures within the professional community of journalists. Journalists working in the same editorial office tend to develop strong group identities, but this is also true—indeed, even more so—for journalists working as permanent correspondents: Whereas the influence of the home office will usually leave a weaker impact, the identification with other journalists whom a correspondent meets during his daily work is often quite strong.<sup>23</sup>

This peer effect was, potentially, especially strong for journalists from the former Yugoslavia who worked for anti-ICL outlets. The journalists from the former Yugoslavia exhibited considerable diversity in their attitudes toward the Tribunal, but worked among Western colleagues who were primarily pro-ICL. Thus pro-ICL journalists from the former Yugoslavia received reinforcing messages from the other foreign correspondents at the ICTY, whereas anti-ICL journalists from the region



were exposed to conflicting pressure, as their home office expected them to take an anti-ICL stance but their immediate peers were pro-ICL.

If we consider the effects of peer influence from the perspective of the Tribunal, it would have been much more preferable to be criticized by anti-ICL outlets whose correspondents were working in The Hague. The majority—though by no means all—of media outlets from Serbia and the RS evinced an anti-ICL frame and were quite negative about the trial and the ICTY. Journalists working for these outlets would have felt pressure from their editors to frame the trial negatively (a view they might themselves share), but those based in The Hague would have interacted with their pro-ICL Western colleagues, who would have introduced a countervailing and moderating pressure—at least as long as the dominant pro-ICL view prevailed. Indeed, by multiplying obstacles for journalists from the former Yugoslavia,<sup>\*</sup> the Dutch government—itself strongly pro-ICL<sup>†</sup>—unintentionally strengthened anti-ICL media frames by isolating anti-ICL Yugoslav media from the mitigating influence of the community of correspondents in The Hague.<sup>‡</sup>

Certainly, the differences between frames adopted by various media in the former Yugoslavia were dramatic: Whereas the frames used by pro-ICL media did not differ very much from the Western frames, anti-ICL outlets from the region mostly saw the ICTY “as the place where national heroes were harassed by a biased prosecutor[.]”<sup>24</sup> Indeed, one of the main differences between pro-ICL and anti-ICL media from the region consisted in the role that heroes, rather than victims, played in their frames. Anti-ICL journalists from Serbia, Croatia, Bosnia, and Kosovo tended to report on a standoff between prosecutors and defendants from the reporters’ ethnic constituency, but often ignored court sessions during which victim testimony was being heard. Surprisingly, they not only ignored victims from other ethnic groups, but also from their own constituency.<sup>§</sup> Contrary to the dominant trend in Western pro-ICL media frames, victimhood as such was a non-issue for anti-ICL media from the former Yugoslavia. Ethnic solidarity concentrated on the heroes, not on the victims.<sup>¶</sup> This partly explains why the Prosecution’s objective “to give victims a voice[.]” to which Del Ponte frequently referred in public,<sup>25</sup> could only be accomplished in pro-ICL media, but largely missed its mark in the former Yugoslavia, where anti-ICL frames prevailed. As Bieber’s

chapter, among others, shows, the publics in the former Yugoslavia were not only ignorant of other ethnic groups' victims, they were not interested in victims at all. For them, the ICTY did not bring justice to their victims, but injustice to their war heroes on trial.

One of those heroes, for some Serb media outlets, was Milošević himself. Mirroring the pro-ICL's inability to channel the legal presumption of innocence, neutrality also seemed to be beyond the reach of nationalist Serb media—or of Milošević's few, scattered defenders abroad—for whom the bare possibility of legal guilt was foreclosed: For them, the former President of Serbia and the FRY was innocent and the whole trial biased, no matter what evidence might come up. Indeed, the general underlying tendency of their reports changed less over time than that of Western media outlets.<sup>26</sup> Milošević's death only provided another element to their frame, one which fit perfectly into the existing narrative: After harassing him for years, his persecutors finally had him killed, to cover up their obviously inadequate and falsified case.<sup>27</sup>

## **IV. The Role of the ICTY in (Not) Shaping the Media Frame for *Milošević***

Compared to these other external activities, the media activities of the ICTY itself were surprisingly modest. There were press conferences, and, roughly at the same time as the *Milošević* trial began, the Tribunal also began a belated outreach effort. Beyond this, however, the ICTY's efforts to engage the media and shape their reporting were minimal, failed to address or correct the deterioration in the Tribunal's image, or were even counterproductive.

In its early years, the Tribunal had no coherent public relations strategy; the final establishment of the ICTY's outreach program in September 1999 came too late and was not ambitious enough, as its regional bureaus were understaffed, ill-equipped, and dependent on external funding.<sup>28</sup> But the biggest failures occurred in areas in which no or almost no additional funding was needed and a few improvements could have led to disproportionately good results, such as making regular efforts to present the Prosecution's preferred framing of its trials to the media and

to elaborate a coherent public relations strategy aimed at maintaining and enlarging the initial support of pro-ICL media for the ICTY. Del Ponte often gave interviews, made speeches, and answered questions (for example in the European Parliament), and used the media to pressure hesitant and obstructive governments. But she rarely did so in The Hague or to the press corps of the ICTY that was actually reporting on the trials;<sup>\*</sup> when she did, she hardly ever disclosed anything that could be seen as a trial strategy. Almost none of the Prosecution team members for the *Milošević* trial were available for regular background talks or interviews, as Del Ponte's spokeswoman, Florence Hartmann, centralized the official public relations work.

The weekly press conferences were little better. The Tribunal's press office sent out invitations for the weekly conference conducted by Hartmann. They usually were rather technical, serving as an opportunity to distribute legal documents, deal with accreditation processes and the trial schedule, or announce visits of judges and prosecutors abroad or of prominent foreign guests to the ICTY. Substantive questions about opinions, interpretations, or intentions of members of the Prosecution team were left unanswered, or were dealt with in a cursory, superficial manner.<sup>29</sup> Neither the Prosecution's nor the Tribunal's press teams actively sought to shape or influence the media debate about the ICTY.

From the point of view of the Prosecution, this policy had certain positive aspects: It prevented leaks to the media to a large extent, enhanced the security of protected witnesses, and prevented conflicts with the Trial Chambers about media appearances by members of the Prosecution. In other words, it shielded the Prosecution from conflicts such as the one the *Amicus* Wladimiroff's interviews had created, and for a long time it prevented internal conflicts within the Prosecution from leaking out.<sup>\*</sup>

There were also, of course, huge disadvantages and costs to the institution. Most journalists actually in The Hague were, or could have been, natural allies of the Prosecution owing to the pro-ICL position of their outlets. But because they were kept at maximum distance, cut off from even informal contacts with prosecutors and investigators, these journalists began to live and work in a separate world in which lack of understanding of the Prosecution shaped their attitudes. Time and again,



Del Ponte's spokeswoman—herself a former journalist (and author in this book)—treated journalists with suspicion, and many journalists saw her as an obstacle to their work rather than as an aid or source of information.

The splendid isolation of the Prosecution had unexpected consequences detrimental to the image of the whole ICTY. With few informal, reliable contacts with journalists, the Prosecution had little possibility to resort to controlled leaks that could have facilitated its work and improved its image.<sup>†</sup> And, given the absence of direct information from the Prosecution, journalists had to resort to other sources—defense lawyers, external experts, politicians, and diplomats—some of whom were quite critical of the Tribunal, the Prosecution, or Del Ponte and her trial strategy. Reporters in The Hague frequently obtained earlier and better information about prominent upcoming witnesses and the contents of their statements from their home offices than they were given by the Prosecution, whose spokespeople usually vigorously declined any comments about such issues.<sup>‡</sup> By doing so, they left the initiative to shape the news to the correspondents' home offices and the witnesses and lost any possibility to frame the news coverage. Additionally, this reinforced the image of the ICTY as a secretive and hermetic institution, hostile to the media.

There is one particularly striking example, which arose during the *Milošević* trial, of the detrimental consequences this mutual isolation had for the Prosecution public image. It was widely supposed, and reported, that the Prosecution's case for genocide in Bosnia was not going well.<sup>30</sup> At the same time, however, after protracted negotiations, the Prosecution had managed to obtain the minutes of the VSO from Serbia, documents the Prosecution regarded as crucial evidence for the genocide count.<sup>\*</sup> The minutes were protected by two confidentiality orders—themselves confidential<sup>31</sup>—which prevented the ICTY from publicly disclosing them or transmitting them to the ICJ, where the *Bosnian Genocide* case against Serbia was pending.<sup>32</sup>

Although these documents were introduced during in camera sessions at the Tribunal, the wider public was still convinced that the Prosecution had been unable to produce any significant evidence linking Milošević to Srebrenica and proving his mens rea in the genocide case.<sup>33</sup> Under conditions of mutual trust, information about the content of the minutes



might have sufficed to incline pro-ICL media to reassess their opinion about the genocide count in the *Bosnia* indictment, even if those journalists had kept the information confidential (which is admittedly unlikely). The information about the existence of the minutes and their transfer from Belgrade to the Prosecution leaked out anyway in early 2004,<sup>34</sup> but fuller information on the content of the minutes was not disclosed until after Milošević's death, when it could no longer have any effect on the outcome of his trial.<sup>†</sup>

The mutual mistrust is even more astonishing if one considers that the ICTY's courtrooms were largely empty of the sort of journalists whom the Prosecution had reason to mistrust. As we have seen, the overwhelming majority of anti-ICL journalists from Serbia and the RS never came to The Hague, instead commenting on the trial from their home desks. Journalists who actually sat behind the bulletproof window of Courtroom I were almost entirely pro-ICL, potential allies in the Prosecution's struggle against impunity. Ignoring them and starving them of information deprived prosecutors of channels through which they could have explained the actual significance, coherence, and importance of their overall strategy, the genocide count in the *Bosnia* indictment, the expected influence of crucial witnesses, or other elements of their strategy, which were often misrepresented by the media.<sup>‡</sup>

It is obvious that the Chambers and Registry could not engage in informal contacts with journalists without arousing suspicion of bias,<sup>\*</sup> yet the Prosecution—which, although subject to some ethical restrictions, did not have the same obligations of neutrality<sup>†</sup>—was even more hermetically sealed than the press service of the Tribunal, whose duty it was to represent the Chambers, the ICTY President, and the Registry. ICTY spokesman Jim Landale and his staff were often more outspoken and more at ease with journalists than was Hartmann for the Prosecution. However, as Landale took the floor less frequently than Hartmann, it was ultimately she who had the greater influence over the ICTY's public image. Still, although the Prosecution bore much of the responsibility for the poor relations with journalists and for foregone opportunities to influence reporting, in the end, when the dominant pro-ICL frame turned more skeptical, media criticism was targeted at the whole Tribunal, not only the Prosecution.

## V. External Actors' Attempts to Shape Media Frames about *Milošević*

Journalists are more accepting of external influences that they perceive as coming in the form of information, rather than instruction or direct pressure. Facts and events that comport with the preexisting frame are more likely to be treated as reliable and useful information in the first place. For those covering the *Milošević* trial, there were principally three sources that provided frames and interpretations in order to influence the media frames concerning *Milošević*. Each of them applied a different strategy and tried to achieve a different objective.

First, from time to time the International Committee to Defend Slobodan Milošević<sup>‡</sup> would organize press conferences in the Dorint Hotel opposite the ICTY. These conferences were usually suffused with radical rhetoric mixing conspiracy theories, alterglobalism, communist and Serbian nationalist propaganda, and anti-Americanism, as well as negationist or denialist claims about the charges leveled by the Prosecution. Because the frame and rhetoric of these press conferences diverged radically from the frames used by mainstream media, their influence was rather limited and the number of journalists attending these conferences steadily declined.\*

This was in marked contrast to the conferences held by Human Rights Watch, which had strongly supported the creation of the ICTY and welcomed the *Milošević* trial as a triumph of justice over impunity. HRW's media strategy was very active, trying to capture journalists' attention with issues that went beyond their everyday business and delivering printable quotes whose style and contents positively contrasted with the legal terminology of the judges, prosecutors, and spokespeople. Richard Dicker, director of HRW's International Justice Program, frequently flew in to meet journalists, organize press conferences, give interviews, and provide background information, which was difficult for most journalists to obtain directly from Tribunal sources.<sup>35</sup> HRW conferences were usually crowded, the more so as HRW sent out invitations, briefs, and reports by e-mail.

But HRW's interventions were not frequent enough to affect the daily news coverage of agency journalists and correspondents. They had to write

reports every day, whereas HRW's press conferences and releases reached them on average once in a month. HRW was to a large part successful in dissuading journalists from challenging basics, such as the legitimacy of the ICTY and the fairness of the trial, but it is doubtful if the majority of journalists, already positively inclined to the Tribunal, would have initially questioned these anyway.

Still, in many regards, it was Human Rights Watch that contributed most to upholding a positive narrative about the trial. For example, although Del Ponte refused to talk about the ethnic aspects of her prosecution strategy—a source of resentment for Serbs—HRW took up the topic, justifying the statistically disproportionate Serb share of indictments by pointing to Serbs preponderance in committing crimes during the wars, and refuting Milošević's claims about a lack of equality and fairness in the trial.<sup>36</sup> In August 2004, when Milošević started to call defense witnesses, HRW decided to counter increasing media criticism of the proceedings. "Perceptions of the trial have been distorted by a dual impatience[,]" HRW explained in a press release,

to see Milosevic convicted quickly and to see Serbia transformed from a hotbed of aggressive nationalism into a functioning democracy. Frustrated by lack of progress on these issues, critics have made a convenient scapegoat out of the International Criminal Tribunal for the former Yugoslavia.<sup>37</sup>

Unimpressed by discussions within the epistemic community around the ICTY, HRW continued to circulate legal interpretations consistent with the Prosecution case, while asserting that these interpretations were uncontested among lawyers.<sup>38</sup> Consistently, until the end of the trial, HRW put the blame on Milošević himself for delaying the trial, obstructing procedures, and manipulating justice, and refrained from outspoken criticism of the ICTY. The alleged inequality of arms between the Prosecution and the Accused never became an issue for HRW, while doubts about the use of JCE theories were usually dealt with according to the Prosecution interpretation.<sup>39</sup>

Above all, unlike the Prosecution and the Tribunal more broadly, HRW followed an active, as opposed to reactive, media strategy. Its researchers and activists picked up the main arguments of anti-ICL media in Western Europe and the Balkans and then tried their best to refute them in their



releases, comments, and public statements, often addressing a wider audience than the disputed argument had targeted. Indeed, HRW defended the ICTY more actively than the Tribunal did itself.\*

Third, many reporters, especially those not permanently based in The Hague, received trial summaries, comments, and reports through news agencies, including specialized agencies such as the Institute of War and Peace Reporting, SENSE News Agency, and the Coalition for International Justice (CIJ),† many of which reported primarily or exclusively on the ICTY. Generalist news agencies such as DPA, EFE, AFP, and Reuters were much more widely used and quoted by print media, broadcasters, and television, but—consistent with their editorial mission—these agencies generally refrained from serving specific narratives. Their texts were mostly constructed so as to fit into any narrative.

By contrast, specialist agencies such as SENSE and IWPR, which were openly pro-ICL, were strongly victim-oriented and provided their own narratives and frames. These agencies had their own direct readership, but also served, similarly to HRW, as a source for other reporters. In terms of quotes, interviews, and other forms of media presence, IWPR surely outperformed any other specialist agency, but even IWPR was unable to persuade anti-ICL media to diametrically change their position or even to reshape their frames; it, like the other specialist agencies, ended up serving as a source for like-minded readers and reporters, rather than as agents of change among suspicious populations in the former Yugoslavia. By exposing the shortcomings of the *Milošević* trial, it upheld its credibility and reliability among its audience, but at the same time strengthened critique toward the Prosecution and the ICTY.

## **VI. Not the Only Trial in the Frame: The Impact of *Milošević* on the ICTY's Public Image**

Given the prominence of the Accused and the obvious opportunities for relating the charges against him to the whole range of conflicts over which the Tribunal sat in judgment, the *Milošević* trial was a crucial moment in the history of the institution and a key opportunity to actively shape its public image. The ICTY and the Prosecution failed to take advantage of



this opportunity—but this does not mean that the way the media framed the trial, and the slow decline in the pro-ICL narrative, depended primarily or directly on the decisions of the ICTY or the Prosecution. Although the *Milošević* trial furthered the deterioration of the ICTY's public image, it itself did not cause the dominant media frames to shift from positive to negative. On the contrary, the underlying challenges to that frame were already in place; the length and prominence of the *Milošević* trial simply directed journalistic attention more sharply towards the tensions between that frame and the Tribunal's operations.

As we have seen, the basic narratives defining the media frames—both pro- and anti-ICL—about the *Milošević* trial and the Tribunal had already come into being long before the trial started; indeed, it was the prior existence of these frames that determined the valence of the intense coverage afforded the opening of the trial. So one might suppose that the increasingly critical tendency in media coverage of the Tribunal observable during *Milošević* simply represented a plausible story about a trial that was in fact not going according to plan. But many of the problems journalists began to report on had already existed before the start of the *Milošević* trial: Lengthy trials, joinder problems, and disputes about JCE had been difficulties for years.<sup>\*</sup> All these cases had been exposed by news agencies, and coverage of the ICTY had already become more critical even before the *Milošević* trial started.<sup>40</sup> Due to the relatively lesser significance that the media had attributed to these cases, however, they had only a marginal impact on the ICTY's image.

The *Milošević* trial contained its own examples of these more general problems, but—precisely because of the publicity attaching to it and its seeming fit with the existing media frames—the trial highlighted and exacerbated these problems, exposing them to a much broader audience. So although *Milošević* also created some new causes for concern—most prominently the Accused's (partly self-inflicted) health problems and his decision to defend himself, which led to the trial's self-representation crisis, as well as the sheer enormity and scope of the charges against him<sup>\*</sup>—the trial was primarily a highly salient example of broader, preexisting trends.

Thus the initial coverage of *Milošević* actually represented a temporary improvement in the dominant media frame and the ICTY's

public image, which had already begun a gradual decline: The start of a highly mediatized trial put the ICTY in a much brighter light than it had been in before, with the concomitant sidelining of permanent correspondents by parachutists who were not critical of the ICTY and were reluctant to include such elements into stories about the final victory of justice over the butcher of the Balkans. The Tribunal they had hailed in their articles was an abstract concept of justice, detached from the more complex, nuanced day-to-day reality of the real, existing ICTY. When the parachutists left, they took that positive image with them, and the challenges to the easy, uncomplicated narrative—which had already been making their presence felt—reappeared in the reporting.

From this perspective, the *Milošević* trial worked on the ICTY's public image like a magnifying lens, illuminating the dark spots even as it dominated the Tribunal's public image. Things had already begun to go wrong, but after the initial media hype in the first days of the trial, many more media outlets gradually became aware of the ICTY's shortcomings, structural problems, and legal and political constraints. Years after the *Milošević* trial, Olga Kavran, a spokeswoman for the Chief Prosecutor, Serge Brammertz, disputed the link between the ICTY's performance and its now much more negative representation in the media. "The level of work done here has not decreased—quite the contrary[,]” she said in an interview. “But the perception is that the only case we ever handled was *Milošević*.”<sup>41</sup>

## The Court and Public Opinion

### Negotiating Tensions between Trial Process and Public Interest in *Milošević*

JUDITH ARMATTA

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*When Milošević died, the unrealistic expectations that had already built up around his trial led to a rush to judgment, which dismissed the trial and even the whole ICTY as a failure of international justice. The Chamber and Prosecution had made mistakes, but the media and public disillusionment with the Milošević trial also arose from endemic, structural tensions between the necessary processes of trial, the incentives driving media organizations, and the interests of broader publics. Legal officers were constrained in their ability to engage the media, which in turn focused on Milošević and his antics in court to the near exclusion of victims and the grievous crimes of which he stood accused. This distorted public perceptions of the trial. Still, the dominant, dismissive view of the Milošević trial will not stand the test of time: Subsequent trials at the ICTY and other tribunals demonstrate both the vitality of international criminal law and the ICTY's continuing influence, including on media and policy practices. Indeed, this may prove part of the Milošević trial's enduring legacy: Although, in its aftermath, many expert commentators concluded that the Milošević trial was a failure, the encounters between ICTY personnel and press during the trial have in fact led to the*

*development of ways to ameliorate the structural tensions that led to those apparent failures.*

## **I. Unrealistic Expectations**

The frustration expressed by the Tribunal's spokeswoman, which Bachmann describes at the end of his chapter, is understandable: The idea was current, and to a large degree still is, that the ICTY has been a failure, and the principal piece of evidence for this view is the terminated trial of Slobodan Milošević.

This was surely not the effect the Tribunal and Prosecution had hoped for when charges were first brought, but it was always supposed, from the start, that the *Milošević* trial would be momentous. *Milošević* offered as the Accused one of the most prominent actors in the dissolution of Yugoslavia, charged with presiding over a massive joint criminal enterprise spanning three wars over a decade. Expectations were high: Having spent over two years getting organized and waiting for arrests of indictees, and over five years trying secondary figures, the ICTY needed this trial to justify its existence; the general public anticipated a dramatic account of high-level involvement in horrendous crimes on a vast scale; victims hoped for a measure of justice; and the media looked forward to reporting on—as it was so frequently called—the trial of the century. *The New York Times*, among others, tied the success of the ICTY to the success of this one trial, predicting it would overshadow the Tribunal's other significant accomplishments: "Mr. Milošević's trial will be [the ICTY's] capstone. The tribunal will ultimately be judged on its competence and fairness in this case."<sup>1</sup> Fairly or not, the *Times* might have added.

Even before the trial's premature end, those expectations were disappointed, in part because they had been excessive.\* As Bachmann shows, at the outset, few cautionary voices were raised about the limits of any trial, let alone this first trial since Nuremberg of a former head of state for war crimes, held before a still-neophyte international tribunal.† Trials are highly technical legal proceedings designed to determine whether an individual is guilty of specified crimes; they little resemble the dramatic renditions on television and in the movies that are resolved in a few hours



at most. Evidentiary and procedural requirements lead to hours of tedious questioning and argument: The authenticity of documents must be established; exhibits must be marked and submitted; expert witnesses must be qualified. Much of trial practice is simply boring. This is true even for trials that, with time and distance, have acquired a patina of drama: “[T]he Nuremberg trials ... were once likewise attacked as staggeringly dull,” described by Rebecca West as a “citadel of boredom.”<sup>2</sup>

Moreover, the very things that made *Milošević* seem promising as courtroom drama also presaged trouble with the trial process. The indictment was sweeping and relied on relatively novel and controversial legal theories, such as JCE. Milošević elected to represent himself, despite having a serious heart condition—a primary cause of the lengthy trial—and announced that he would not put on a forensic defense but would use his allotted time to make a political case to the public. Given that the Accused had been a head of state, the political aspects of the trial were as potentially disruptive as they were enticing. That the trial did not proceed smoothly should have surprised no one. The ICTY, which might have explained the trial’s limitations and warned of the difficulties that lay ahead, was conflicted by its interest in promoting itself as an institution and its duty to stand above the fray. Further, as Bachmann also notes, the Tribunal lacked both a coherent media strategy and organized means of conveying its message to the public and press.<sup>3</sup>

Bachmann focuses on the frames imposed on trial reporting—a view that implicitly assumes considerable malleability in the construction of journalistic narratives about trials—but there are endemic tensions between the processes of trial and the interests of broader publics. Substantive aspects of the *Milošević* trial—such as the necessary focus on connecting a head of state to crimes on the ground and to establishing his de facto authority over criminal perpetrators in other states—posed real, irreducible challenges to those seeking to report on it. These challenges are not insurmountable; there are specific ways in which international courts and media can address them, and the lessons about how to do so—learned the hard way in Milošević—may prove one of that trial’s enduring legacies.

## II. Interests of, and Constraints on, the Tribunal— Assuring a Fair Trial

Legal professionals are wary of trial by media, and necessarily so. Ethical rules and institutional logic direct them to protect the trial process against bias from outside influence. Judicial decision makers are enjoined to make their decisions solely on the record produced at trial, putting aside prior knowledge and biases generated by the media and other sources.<sup>4</sup>

Although judges at the ICTY are not governed by a written code of conduct, they are guided by ethics rules from their home states, where they exist. For example, judges from England and Wales—such as the first presiding judge, Sir Richard May—are cautioned to “exercise their freedom to talk to the media, with ‘the greatest circumspection[.]’”<sup>5</sup> The purpose of such rules is to protect the integrity of the trial process, but they also have the effect of limiting judicial actors’ influence on media reporting that could clarify court actions and avoid misunderstandings.\*

The Prosecution must adhere to standards of professional conduct, which require them “to avoid, outside the courtroom, making public comments or speaking to the media about the merits of particular cases or the guilt or innocence of specific accused while judgment in such matters is pending before a Chamber of the Tribunal.”<sup>6</sup> The standards require prosecutors “to preserve professional confidentiality, including not disclosing information which may jeopardize ongoing investigations, prosecutions, or the safety of victims and witnesses.”<sup>7</sup> Prosecution spokesperson Hartmann reminded the press of this responsibility in an interview at the close of the Prosecution’s *Kosovo* case: “No parties in a trial should comment on the trial. We had to do a specific job, which was to present evidence against Milošević [about Kosovo], and we believe that we achieved this work.”<sup>8</sup>

Defense counsel are not so limited,<sup>9</sup> and self-representing defendants even less so, though both are subject to contempt proceedings for interfering with the administration of justice.<sup>10</sup> The ICTY Registrar has prohibited defendants from speaking with the media; former registrar Hans Holthuis took this step to prevent defendants from stirring ethnic passions in the region, as well as to maintain good order in the Detention

Unit. It did not stop groups such as the International Committee for the Defense of Slobodan Milošević from directly communicating with the media to shape narratives about the trial, nor did it prevent Milošević from playing to the media inside the courtroom. Although these efforts were effective in framing trial narratives in the Serbian press (with notable exceptions) and among journalists and commentators with an anti-Western bent, for others it simply reinforced a tendency to report on Milošević's behavior and the trial as combat, rather than on the actual evidence and formal legal process.

Beyond professional and ethical constraints, the goals of the trial process and the logic created by the structure of trial imposed further constraints on the Tribunal's ability to manage media coverage. The Chamber's overriding responsibility was to assure a fair trial; this included ensuring Milošević's right to confront the witnesses against him and to an expeditious proceeding. The combination of the much-criticized 66-count joined indictment and the time limits imposed by the Chamber compelled the Prosecution to present, and the Chamber to allow, a significant amount of victim testimony in writing, even though this hardly made for compelling courtroom drama.\* Only summaries were made available to the press, and not consistently. Even then, the Chamber's concern with Milošević's rights as a defendant led it to require, on Milošević's request, the appearance of nearly all witnesses whose testimony the Prosecution had submitted in written form, in effect handing Milošević the initiative in controlling the agenda of oral testimony and adding to the length of the trial.† None of this satisfied victim witnesses, whose stories were reduced to brief summaries read by the Prosecution and only developed more in cross-examination by Milošević. It led one Kosovar Albanian witness, Shefqet Zogaj, to protest, "Your Honor, allow me to say something about what I experienced myself. Because we're bypassing...." Judge Kwon cut him off, saying "We have your statement."‡

Whether presented orally or in writing, evidence of crimes was necessarily repetitive as similar testimony from a number of witnesses was required to establish widespread ethnic cleansing and genocide—but here too, repetition had a tendency to turn the shocking into the banal for some.\* Similarly, the Trial Chamber's duty to protect victim witnesses often required not only anonymity or face and voice distortion, but the



partial or entire closure of sessions to the press and public. Closed sessions tended to contain some of the most sensitive testimony, but they presented a problem for journalists, who could not report anything about trial sessions they could not even watch. This had particular effects on what was covered: As nearly all firsthand testimony about rapes was given in private session, sexual assault was all but absent from the public trial record and, therefore, media reports.<sup>11</sup> The need for confidentiality was real as women from rural Kosovar communities who publicly acknowledged that they had been raped were likely to be ostracized, but the result was that the sexual assault of women and girls remained a hidden crime. Although some testimony was made public after the close of the trial, it was not picked up by the press, who no longer had an interest in the proceedings.

All of this helped shift the trial's focus from the alleged crimes and victims to Milošević, his antics in court, and his non-forensic, political defense. But to give the defendant a forum for his non-forensic purposes and to focus significant attention on his diatribes, as happened in the *Milošević* trial, is to ignore the interests—and tragedies—of victims.

Belatedly, the ICTY recognized its responsibility to the public—and its own interest in communicating with that public—by establishing outreach offices in 1998 and 1999. Offices in Zagreb, Belgrade, Sarajevo, Pristina, and The Hague provided workshops for Balkan journalists, politicians, and judges. A Media Office, established earlier in 1994, responded directly to the media as well as the general public. These efforts were therefore in place before the *Milošević* trial began. Nevertheless, as Bachmann shows, Tribunal spokespeople tended to err on the side of caution in speaking to the media. The ICTY's requirement to protect victim witnesses, together with ethical requirements limiting disclosure in individual cases, contributed to a culture of secrecy that went beyond what was necessary to insure the integrity of the legal process.

### **III. Interests of the Media—Transparency and Dramatic Narrative**



If court officers have incentives to avoid media influence, journalists have incentives to disregard the logic of the legal process in pursuit of compelling stories. The media relies on drama to generate public interest, and although there was much drama in the *Milošević* trial,<sup>12†</sup> there were also hours of boredom when, for example, the Prosecution needed a witness to verify a stack of documents, identify the function of a dozen armored vehicles, or discuss the intricacies of constitutional law. Moreover, given the length of the trial—the numerous and unanticipated delays due to Milošević's illness, and the time needed to meet procedural and evidentiary requirements—it was impossible for all but a few news organizations to justify regular coverage after the first few weeks.

Diminished media interest in the trial was thus to a certain extent normal, as with any story of long duration. But there were also aspects of the *Milošević* trial itself that proved challenging for journalists seeking to craft a clear narrative. *Milošević* was a leadership trial, and in any such trial, the essence of the Prosecution's case is to connect the Accused with those who actually committed the crimes. This was particularly a challenge in the *Bosnia* and *Croatia* phases, as Milošević had lacked de jure authority over the RS and RSK or their military forces. Thus, dramatic evidence of crimes, and victim testimony about the harm they suffered, was secondary and often was established through adjudicated facts from other trials.\* Absent a smoking gun, such as a direct order from Milošević to the Bosnian or Croatian Serbs, the Prosecution was left to build its case on circumstantial evidence—hardly the stuff of dramatic narrative. Even where there was an evidentiary basis for drama, the institutional orientation of the Tribunal acted as an obstacle to reporters; in the most prominent example, the Chamber kept some of the most dramatic and potentially damning evidence—minutes of the VSO that allegedly connected Milošević to the Srebrenica genocide—confidential at the request of Serbia.†

The media itself also shied away from telling victims' stories.‡ As Bachmann points out, citing Mirko Klarin, anti-ICL media in particular directed their attention to the defendant while virtually ignoring the victims, even those of their own nationality. The focus of the trial—but also of the media—was Milošević.§ That is inevitable in a leadership trial and legitimate to a point, but it also alters the character of coverage; as

former ICTY Judge Patricia Wald notes, “The media’s focus in these trials [of heads of state] has been predominantly on the accused and his antics rather than on the evidence of his crimes or on victims’ testimony.”<sup>13</sup>

Milošević’s choice to represent himself exacerbated this one-sidedness. Although defense counsel must conform to legal rules and procedures, Milošević announced he did not recognize the ICTY’s legitimacy and had no intention of putting on a defense but would use his trial as a forum to make a political case to his public and to influence history. Despite his proclamation that his purpose was not forensic, the judges allowed him to proceed: Their priority was to assure that his trial not only was fair but appeared fair—and that, they concluded, required Milošević’s participation. It also, of course gave Milošević the forum he wanted: Acting as his own attorney, he took center stage throughout the Prosecution’s case, leaving victims and the crimes of which he was accused in the shadows. This was a decision taken by the Chamber for its own institutional reasons, but it reinforced the professional predilections of journalists, who to a large extent supported Milošević’s right to represent himself, to the exclusion of other interests.. Permanent correspondents generally argued that the Chamber should have allowed Milošević to use his time however he wanted without restriction: If he chose to make speeches (he did) or debate (he tried), the Chamber should let him do it—it was only hurting him.<sup>14</sup> But it was not: It was making a mockery of the Tribunal and the rule of law, and the media’s tendency to report his performance rather than substantive trial issues simply encouraged this. The Chamber’s decision to allow Milošević to represent himself also contributed substantially to deteriorating media and public interest in the trial as it led to hours of repetitive, irrelevant questioning and speech-making by Milošević, numerous reprimands from the Chamber, and long delays occasioned by adjournments for Milošević to recover his health and stamina.

The media, of course, is not monolithic. A number of journalists provided quality coverage of the trial despite the limitations of their agencies’ resources and support and the Tribunal’s reticence.<sup>15</sup> Constrained in their ability to be present at the *Milošević* trial on an ongoing basis, they relied on others who were, such as the SENSE News Agency, Balkan journalists, IWPR, Thomas Verfuss of the Dutch ANP, and

CIJ, to which we now turn. Media that did not follow the trial even on an irregular basis took their stories from other sources with little evaluation.

## **IV. Meeting the Needs of Public and Media—The Role of Specialized Reporting Agencies**

Not all conflicts between legal and media interests are readily resolvable; some are structural and arise from differences between the institutional incentives of the court and media. The Tribunal's primary responsibility is to assure a fair trial, and this creates incentives for court officers to abjure public comment. Boring, technical legal procedure remains essential—indeed, the qualities that make those procedures boring are precisely the ones that make them useful in the legal process. Similarly, some media limitations are unlikely to change: Because it is guided by its bottom line of profit-making, mass media will continue to respond to perceptions about what the public is interested in, rather than some abstract idea of public interest. Reporting resources are limited and will never be sufficient to provide daily coverage of a war crimes trial that lasts more than a year.

Media coverage can be improved, however, in ways that ameliorate some of these tensions. Specialized news and human rights organizations have arisen to fill the gap between what legal professionals involved with a trial can disclose and what the media and public want to know. Not only do they provide comprehensive and continuous coverage of individual trials from opening statements to final judgment, they also write opinion and analyses that explain the legal complexities of an international war crimes trial. They act as a resource for the mass media and the public who have direct, immediate access to their reports online.

At the *Milošević* trial, these organizations included the SENSE News Agency, the Coalition for International Justice (CIJ), and the Institute for War and Peace Reporting (IWPR). SENSE, established by Mirko Klarin in 1998, provided regular television coverage to the former Yugoslavia; posted daily, brief articles about *Milošević* and other trials; and created videos explaining and analyzing Srebrenica, the creation of the ICTY, and the hunt for Mladić and Karadžić, among others.<sup>16</sup> CIJ provided an on-site



attorney to observe the trial, post regular reports focused on legal issues, and act as a resource for journalists and academics.\* IWPR's *Tribunal Update* posted a weekly review of trials and occasional features and opinion pieces.<sup>17</sup> All published regular news reports online, highlighting important issues and testimony; all three were published in Serbo-Croatian and English. Although articles were kept short for the most part, the daily coverage provided a wealth of information, directly and promptly available to the public as well as the press.<sup>18</sup> Journalists could draw from reports on their Web sites for their own reporting; mainstream media regularly turned to on-site observers from these organizations for interviews, quotes, and background information, thus partly filling the gap in coverage.<sup>†</sup>

These organizations do not face the same limitations as traditional journalists: With funding support from philanthropies, and, in some cases, individuals and governments, they neither rely on advertising nor respond to a commercial bottom line.<sup>19</sup> They are, however, vulnerable to the changing interests of funders. Klarin created SENSE to report on the ICTY specifically, but it also covered the *Bosnian Genocide* proceedings before the International Court of Justice. CIJ, a small agency with few staff created initially to support the ICTY and ICTR, also provided support for criminal and transitional justice initiatives for Sierra Leone, East Timor, Cambodia, and Sudan.<sup>20</sup> IWPR, which predates the ICTY, works to build the capacity of local journalists in states at war, transitioning from war, and living under dictatorships. Other NGOs have arisen to cover trials at other ad hoc tribunals and the ICC.<sup>21</sup>

These specialized agencies and NGOs are not beholden to the Tribunal about which they were reporting, though all are pro-ICL. The independence of these specialized organizations from the Tribunal and the Prosecution gave them a certain cachet with mainstream media, as they were able to provide a critical assessment of the trial. For example, from the first year of the trial, CIJ posted articles critical of the Chamber's deference to Milošević and its decision to allow Milošević to represent himself.<sup>22</sup>



## V. Rush to Judgment—The Overlooked Value of the *Milošević* Trial

In the end, when the trial concluded not with judgment but with Milošević's death, a dominant theme emerged in the mass media, largely quoting experts, that this much-anticipated trial had been a failure, and this in turn was thought to reflect poorly on the ICTY's entire record.<sup>23</sup> There were dissenting voices, who argued—rightly—that this new, negative frame was a simplification, premature and, in many respects, simply wrong.<sup>24</sup>

For with all its many faults and lack of a judgment, the *Milošević* trial accomplished a great deal. The *Kosovo* indictment provided a reason for the arrest and removal of Milošević from Serbia once he was ousted from office. Without the arrest, Milošević would likely have continued to control the SPS and wielded significant influence on Serbian and regional affairs—continuing Serbia's instability and isolation among nations, and further delaying the possibility of reconciliation. Without his removal, for example, it is unlikely that Serbian President Boris Tadić's apologies to Bosnia and Croatia would ever have happened.\* Although such steps do not, in themselves, constitute reconciliation, accountability by leadership is necessary if reconciliation is ever to occur. And if Milošević had continued to exert power over segments of the SDB, the VJ, and the criminal underground, the arrest and transfer of other figures—including Karadžić and Mladić—would have been even more difficult to effect. Milošević's arrest also allowed local authorities to establish a viable war crimes court in Serbia—an initiative that the ICTY aided both materially and by example—replacing rule by power with rule by law.

The actual trial made further contributions that have lasting value even without a final judgment. It has established a record, both about Milošević's own role and that of the Serb leadership more generally. A number of former high-level associates of Milošević gave evidence against him, revealing the inner workings of a JCE designed to create an enlarged Serbian state free of non-Serbs;† thousands of documents were unearthed‡ that are currently being used in the *Karadžić* and *Mladić* trials.\* Equally, the trial provided a forum for some of Milošević's victims to tell their stories. They were able to directly confront the man they held

most responsible for the destruction of their families, communities, and way of life.<sup>†</sup>

For all its failings, the *Milošević* trial will not severely damage the image of the ICTY or the broader pursuit of international justice in the long run. Prominent as the trial was, it was one trial of one accused; all told, the ICTY has indicted 161 people, and has convicted 93. Recent, controversial acquittals of senior Serbs and decisions by the Appeals Chamber eviscerating command responsibility have done more than *Milošević* to shake confidence in the institution and its justice project. Yet even with these recent decisions, the Tribunal's record of convictions—of members of the RS Presidency; military and civilian officials responsible for the Srebrenica genocide, commanders of the siege of Sarajevo, and ethnic cleansing in Kosovo; officials of concentration camps; participants in enslavement, rape, and torture—paint a picture of the wars' violence and criminality. Other high-level accused, such as Karadžić and Mladić, who were untouchable for years, are now facing trial, and their trials will provide further detail to that picture and to Milošević's involvement. Perhaps most important from the Bosniak victims' point of view, the ICTY has established that genocide occurred at Srebrenica—a finding that the termination of the *Milošević* trial did not affect in the least.<sup>‡</sup> In turn, few doubt the influence of the ad hoc Tribunals, especially the ICTY, on the extraordinary florescence of international criminal law in the past 20 years—the creation of so many new courts; the establishment of the world's first permanent international criminal court, the ICC; and the indictment, arrest, and trial of so many high-level defendants.<sup>§</sup> Another Tribunal spokesman, Christian Chartier, said it best: “This is not a Milošević tribunal.”<sup>25</sup>

Ultimately, the ICTY's place in history will be decided by how people in the former Yugoslavia make use of its legacy and how the international community builds on its successes and failures. Just as Nuremberg and other trials of Nazis were not viewed positively by the large majority of Germans at the time, but later the record they established contributed to a long-delayed process of accountability and healing,<sup>\*</sup> so the *Milošević* trial, as well as the entire record of the ICTY, will remain available for the time when a new generation of Serbs, Croats, Bosniaks, and Kosovar Albanians

can read it from less-biased positions and potentially begin the long process of healing and reconciliation.

## **VI. Beyond *Milošević*—Revising the Relationship between Courts and Media**

Still, in the short and middle term, of course, the dominant view of the trial persists, with negative effects on the assessment of the ICTY, and in significant part, that negative frame is a function—a dysfunction—of different structural and professional positions occupied by international criminal tribunals and the media. Are there lessons, then, from the *Milošević* trial and the broader experience of the ICTY that could be applied to make the tribunals themselves more effective actors in shaping media narratives?

One element of any such reform would involve devising outreach strategies with the press in mind before leadership trials of high-level defendants—such as Milošević, Charles Taylor, or Saddam Hussein—begin. In a report, former ICTY judge Wald explains how it would be possible to protect the integrity of the legal process while meeting the public and media need for information:

Obviously, discretion is needed so as not to prejudice the defendant by talking about the actual evidence beforehand, but the theories of the defense and prosecution, summaries of witness testimony, even the significance of the court's interim rulings can be discussed. There ought to be someone or some place reporters can go to obtain answers to legitimate questions during the trial so that their stories will be accurate and focused on the important aspects of the trial.<sup>26</sup>

Wald recommends a court spokesperson provide daily briefings “to explain the import of the proceedings or particular testimony and to deflect media preoccupation with the antic behavior or outbursts of the defendant.”<sup>27</sup> Discussing case theories, summarizing testimony, and explaining the significance of rulings by the Chamber are not subjects the Tribunal needs to shy away from; it could discuss these without running up against ethical and professional constraints. That the Tribunal did not do this is largely due to the novelty of the situation and its tendency to err



on the side of caution rather than innovation, but this should not prevent other courts, such as the ICC, from engaging more effectively with the media.

Indeed, the ICC has already taken significant steps to address the dilemma of how to be more inclusive while protecting the rights of the accused. The ICC's Strategic Plan for Outreach notes that "[w]hile independence, impartiality and fairness are defining attributes of justice, it should not be forgotten that making judicial proceedings public is a central element of a fair trial and therefore necessary to ensuring the quality of justice. Justice must be both done and seen to be done."<sup>28</sup> As a result, the ICC has established comprehensive outreach and media programs:<sup>29</sup> Trial proceedings are available live online, video summaries are posted on YouTube, and the ICC makes use of Twitter accounts and blogs with court personnel. Its Outreach Office holds meetings with target groups in areas under investigation or where indictments have been brought. As well, it uses radio and other media to reach the public at large, and currently staffs field offices in Uganda, the Central African Republic, Sudan, and the Democratic Republic of Congo. The Rome Statute also provides for victim participation in trials through legal representatives, and for reparation for harm, making it likely that victims will be more than a footnote in leadership war crimes trials.<sup>30</sup> In the ICC's first trial, of Thomas Lubanga Dyilo, over 120 victims were allowed to participate through six representatives. Still, the robustness of these changes has yet to be fully tested—only the *Lubanga* and *Ngudjolo* trials have reached judgment, and to date none of the accused at the ICC has chosen to represent himself.\*

The ICTY itself has implemented changes as a result of lessons learned in *Milošević*. A reconstructed Web site provides live video access to trials and important proceedings such as Mladić's initial appearance. The Web site has a photo gallery for use by the media, videos of victim testimonies and stories, as well as statements of guilt by accused who pleaded guilty. In 2004 and 2005, the Tribunal held a series of conferences in Bosnia (Brčko, Foča, Konjic, Srebrenica, and Prijedor) to explain its work and answer questions.

Specialized agencies continue to provide regular, reliable coverage of international war crimes trials. The Open Society Justice Initiative has



established Web sites for individual trials at the ICC as well as the *Taylor* trial at the Special Court for Sierra Leone, with reporters providing daily coverage as well as occasional analyses and opinion pieces.<sup>31</sup> A consortium of academic, philanthropic, and nonprofit organizations support a Web site devoted to crimes of the Khmer Rouge and the Extraordinary Chambers in the Courts of Cambodia.<sup>32</sup> Other nongovernmental organizations, such as Human Rights Watch, provide background and occasional reports on international trials.<sup>33</sup> The independent reporting agencies have become an indispensable medium for understanding and staying informed about war crimes trials and the continued development of international justice.

But the challenges are structural, and reach to the identities and incentives of courts and media. For the media, the challenge is how to report complex and lengthy international war crimes trials in ways that avoid oversimplification and a focus on the antics of defendants at the expense of the crimes for which they are accused and the victims they have allegedly grievously harmed, but also attract and hold public interest; for tribunals, the challenge is to effectively engage with media—and even shape journalistic narratives—while carrying out their primary responsibility of assuring a fair trial.

And alongside its other present and potential contributions, this may prove part of the *Milošević* trial's enduring legacy. Although in the aftermath of *Milošević*, many journalists and commentators concluded that the trial was a failure—and that the Tribunal had not engaged the media effectively—the conflicted encounters between ICTY personnel and press and during the *Milošević* trial in particular have in fact led to the development of ways to ameliorate the structural tensions that led to those apparent failures.

## PART FOUR

### Final Examination

The *Milošević* trial was only 40 hours from conclusion, at least on the official calendar. We cannot know what judgment the Trial Chamber would have issued, so is any final evaluation impossible? Rather than trying to give a substitute verdict, however, this section dissects the claims about the uses to which the evidence can or should be applied in making sense of Milošević's role in Yugoslavia's wars of dissolution. Two chapters consider the important if contested interim decision issued at the end of the Prosecution phase, including its strategic uses and its value to historiography. The third chapter considers how we should evaluate Milošević's responsibility—in particular the portrayal advanced by the Prosecution—in historical context and in light of the evidence offered at trial.

## Dead Man's Tale

### Deriving Narrative Authority from the Terminated *Milošević* Trial

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*Much of international criminal law's attraction rests on the "authoritative narrative theory"—the claim that judgment creates narratives that serve as the foundation for post-conflict reconciliation. So what happens when there is no judgment? What can be salvaged from the terminated Milošević trial? One candidate for substitute judgment was the Decision on the Motion for Acquittal issued at the trial's midpoint. This chapter examines how the parties and outsiders deployed the Rule 98bis Decision, in the absence of a final verdict, to tell a story about Milošević's guilt or innocence and craft a final judgment in the eyes of the world, if not in law. The doctrinal constraints these efforts faced suggest real limits on law's ability to craft transformative narratives through any process short of final judgment—an indirect challenge to one of the dominant views about what international criminal law is for.*

## I. A Narrative of Transformation, Terminated

One of the most common, if most contested, claims for the efficacy of international tribunals is that they produce authoritative narratives, which in turn contribute to reconciliation.<sup>1</sup> The key element in this claim is the final judgment. While many parts of a trial contribute to the production of narratives, only the decisions of the court carry the imprimatur of official, consequential authority. This is especially true given the largely adversarial nature of many international tribunals: Evidence submitted by one party and critiqued by the other is, by its nature, the product of partisan interpretation, and it is the role of the judge to determine that evidence's ultimate value. It is judgment—grounded in the procedural integrity of the trial but sitting at the apex of the process—that produces the dispositive, displacing authority claimed for ICL's interpretations of violent conflict.

A contested claim, to be sure, but assuming one finds it plausible, what happens when there is no final judgment? Assuming one believes in the transformative power of ICL and its judgments, what can be salvaged from a terminated trial? This is precisely the question that confronted the ICTY—indeed all actors with an interest in the general project of ICL or its particular effects in the former Yugoslavia—when Milošević died.

It was clear, when Milošević was transferred to the Tribunal, that the ICTY had not yet produced any demonstrable reconciliation in the former Yugoslavia. Various communities in the successor states held radically different views on the wars' origins, on who was a victim and who a perpetrator, and what constituted justice.<sup>2</sup> Milošević was unquestionably a critical player in the collapse of Yugoslavia and the violent wars of its dissolution, but his exact role and that of the state apparatus he headed were contested questions, which his trial promised to finally answer. It promised to be the single greatest test of the Tribunal's—and ICL's—ability to forge an efficacious and transformative narrative. But then, of course, Milošević died before judgment could be rendered.

The sudden termination of trials by death is not a hypothetical problem, nor is *Milošević* the only instance. A surprisingly large share of international defendants die before their trials can be completed, and given the nature of the conflicts that tribunals adjudicate and the continuing problems of enforcing indictments, we can expect that the problem will occur with regularity. If judgment matters, this is an endemic weakness for ICL. This chapter considers the meaning of the terminated *Milošević* trial



in relation to the idea that courts produce consequential narratives. In particular, the chapter examines efforts to deploy and interpret the one document from *Milošević* that, more than any other, was thought of as a substitute for judgment: the Trial Chamber's Rule 98*bis* Decision on the Motion to Acquit.<sup>3</sup>

Halfway through the trial, when the Prosecution rested, the Chamber had to decide if there was a case to answer. In their Decision, issued in June 2004,<sup>4</sup> the judges declared the trial should go forward, though what that meant was necessarily ambiguous: The Prosecution had presented enough evidence that *a court could* find Milošević guilty, but the judges did not say that *this court would*. The Decision, therefore, had an irreducibly interim quality, but because Milošević died before a final verdict was issued, the Decision has become “the only pre-Judgement determinative ruling of the Chamber on the case.”<sup>5</sup>

This chapter examines how the Decision has been deployed to tell a story about Milošević's guilt or innocence and craft a final judgment in the eyes of the world, if not in law. The divergent interests of the parties at trial created asymmetrical expectations about the Decision, revealed both in those actors' responses when the Decision was issued and in the ways they tried to deploy the Decision as a quasi-judgment after Milošević's death. These uses were limited by the doctrinal structure that produced the Decision—even actors convinced of Milošević's guilt were constrained from using the Decision to advance that view—in precise ways. These constraints show the tenuous nature of the ICL project, one of the principal justifications for which appears radically contingent on reaching final judgment.

Going further, a close reading of the Decision indicates some parameters for an even more consequential inquiry into how real or limited the potential of even final judgments is in achieving post-conflict transformation. But although this chapter helps lay the groundwork for broader investigation of the authoritative narrative theory, its immediate purpose is forensic—a dissection of the Decision, its internal logic and institutional context, and the uses to which it was put once that context was disrupted by Milošević's death.

## II. The Concept of Judgment as Authoritative Narrative

### A. The authoritative narrative theory

Many justifications are advanced for the project of ICL. One principal rationale is ICL's capacity to cut through endemic partisan contestation and render incontestable judgment about divisive conflicts; this authority undermines alternative claims and histories, creating space for shared understanding of truth, which may serve as a prerequisite for reconciliation.<sup>6</sup> This rationale, appearing in many forms, is contested, but also deeply entrenched in practice and scholarship; we may call it the authoritative narrative theory of ICL.

The authoritative narrative theory begins with an uncontroversial observation: In societies that have suffered violent conflict, shared understandings about history and identity will often have been comprehensively destroyed. Theorists and practitioners commonly suggest that some form of post-conflict justice is essential to the restoration and maintenance of peace.<sup>7</sup>

The strong version of the authoritative narrative theory—which accepts that trials establish truths with consequential value—extends this line of reasoning, arguing that formal legal justice is particularly efficacious in crafting shared understandings.<sup>8</sup> The formal authority attaching to a judgment is different from mere opinion: judgment has both the power of the state (or international community) behind it and the legitimacy of a neutral, professional judiciary; judgment follows a trial that accords different views the opportunity to be weighed in a procedurally balanced forum; and the powers of subpoena and contempt help assure that full information is available. Thus, when judgment is rendered, it exercises a special effect, displacing partisan views. As more and more discursive space is occupied by views that more and more members of society accept, the shared understandings essential to peaceful coexistence are restored.<sup>9</sup> This is a claim about a causal chain, and the chain originates in the trial process and its judgment.

No scholar or practitioner thinks that trial's *only* purpose is narrative, but for those who accept the theory, creating definitive narratives is

central.<sup>10</sup> From this perspective, the Prosecution's expansive strategy was a laudable effort to tell the story of the entire Yugoslav crisis through the prism of Milošević's plan for a Greater Serbia.<sup>11</sup> Judicial narrative is not identical to writing history or a search for truth, but creates a social consensus in which history-writing and shared understanding are possible.<sup>12</sup>

The hard, optimistic edge of this view has receded in recent years.<sup>13</sup> To retrench, however, is not to abandon, and even as scholars and practitioners sophisticate their claims, they have preserved a role for narrative.<sup>14</sup> Individual trials may not create undeniable truths, but they introduce and vet evidentiary baselines that counter denialism and establish facts necessary to a broader narrative: For example, adjudicating a defendant's mental state or deploying a theory such as JCE requires a court to say something about social contexts and war aims. Moreover, the Tribunal's jurisprudence as a whole provides broader authority than any one trial. From this perspective, the *Milošević* Prosecution's broad framing might not have produced a dispositive narrative on its own, but it could have contributed to one, and could still.\*

## **B. Skepticism—The theory's critics**

Other observers question the idea that judgments catalyze transformative narratives.<sup>15</sup> For these critics, courts' technical procedures and legal focus make them ill-equipped to write histories.<sup>16</sup> The fiction of combat balanced by a neutral judge arriving at fuller truth strains credulity: The extraordinary imbalance in resources between prosecutions and defense is well-known;<sup>17</sup> for self-representing defendants such as Milošević, it evidently can reach to the limits of physical endurance.<sup>18</sup>

True justice requires a neutral or nonpartisan position, but the neutrality of court officers is often purchased through an almost total abstraction from and ignorance of the communities whose conflicts they adjudicate.<sup>19</sup> Indeed, it is not clear that there is a simultaneously neutral and informed position: the questions most critical to those for whom an authoritative narrative is most needed are of a nature and complexity that will escape a neutral outsider.



The authoritative narrative theory also faces an empirical challenge: Quite apart from whether international courts construct informed, neutral narratives, can the narratives they do construct actually do what the theory supposes? This is a methodologically fraught proposition—how could one possibly prove the effect of this one variable?—yet the imperfect evidence we have does not support the theory: There is little evidence that reconciliation is occurring in the former Yugoslavia, or that individuals are converging on a common vision of the conflict, let alone that the ICTY has contributed to such a process.<sup>20</sup> In the Balkans and elsewhere, it is not necessarily true that single narratives win out after conflict.

For these skeptics, the *Milošević* Prosecution's strategy was a sprawling overreach that lost sight of the core purposes of having a trial and succumbed to the lure of a narrative of victimhood.<sup>21</sup> The skeptics would prefer a narrow, forensic trial in which such aspirations are rigorously excluded when designing and managing trials.<sup>22</sup> At most, a forensic trial might contribute indirectly to historiography, but a court's judgment will have little value, even indirectly, if the process that produced it has not rigorously excluded the ambitious goals of narrative transformation.

### C. The Special Problem of Death

It is not necessary to decide between these two views, however, because from either perspective, there will be a problem with a terminated trial. The weakest link in the narrative argument turns out to be the first one: the existence of a judgment. At rates that would constitute a scandal in a domestic jurisdiction, defendants in international tribunals die. Out of the 161 individuals indicted at the ICTY, 16 have died before the end of trial<sup>23</sup>—a mortality rate just under 10 percent. Some tribunals with smaller dockets have even higher death rates: Two of the Sierra Leone tribunal's 13 indictments have been withdrawn due to death,<sup>24</sup> and the ICC's record is only slightly better.\* Quasi-international trials confront similar problems owing to the antiquity of the underlying events, or because death can be strategic.†

When defendants die, trials stop. Because there are no mechanisms for rendering judgment *post mortem* or *contra mortuum*, by the authoritative



narrative theory's own logic, as the first critical link in the chain is never forged, the subsequent links never are either. Nor is the problem implicated only by physical death: Any trial that ends without a full evaluation of the substantive evidence should fail to produce the kind of judgment the theory requires.<sup>25</sup>

Final judgment is not the only part of a trial with value. The residuum of a terminated trial has uses—transcripts, exhibits, briefs, and decisions constitute an archive with a meticulous provenance any historian would value.<sup>‡</sup> Acts and images—confession in open court, a shocking film—can have iconic or emotive value.<sup>§</sup> The trial process, and even the very fact of trial, may encourage people to see the rule of law as an alternative to conflict.<sup>26</sup> As Richard Holbrooke declared following Milošević's death, “the trial was the verdict.... The Serb people came to understand the truth that he was not a nationalist, but an opportunist. A kind of rough and imperfect justice was served.”<sup>27</sup>

Yet valuable as these elements can be, they are structurally secondary. They are ancillary—their purpose, really, is to contribute to and demonstrate the integrity of judgment—and it is hard to imagine a robust argument for holding a trial if one knew it would end without judgment.<sup>28</sup> What Holbrooke called “rough and imperfect justice” is simply the absence of authority; indeed, he called it that precisely to make up for the evident fact that its authority is deficient. Thus, the particular problem posed by *Milošević* is the lack of final authority and the consequent search—by those convinced judgment matters—for an alternative. For some people, that search lighted upon what looked like the nearest thing: the 2004 Decision on the Motion to Acquit.

### III. The Decision and Its Context

In March 2004, after the Prosecution rested, the *Amici* filed a motion under Rule 98*bis*, requesting acquittal on a number of counts and allegations. The Prosecution filed a confidential response;<sup>29</sup> Milošević filed no motion. The Chamber issued its Decision in June 2004, allowing

each count to stand, but throwing out hundreds of individual charges; the immediate consequence was that trial continued.

At over 140 pages, the Decision goes into considerable detail about the legal standard applied and the individual allegations—much more detail than other Rule 98*bis* decisions.<sup>30</sup> Defeating a motion to acquit places an extremely low burden on the Prosecution—higher than for indictment, but not by much.<sup>31</sup> At the time, Rule 98*bis* provided for acquittal if a trial chamber “finds that the evidence is insufficient to sustain a conviction on that or those charges.”<sup>32</sup> The test for sufficiency derives, as so much at the Tribunal does, from *Tadić*, through subsequent refinements, and confirmation on appeal in *Jelisić*:

“[T]he true test is not whether the trier of fact would actually arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether it could;” or to put it as the Appeals Chamber later did in the same case, a Trial chamber should only uphold a Rule 98*bis* Motion if it is “entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt[.]”<sup>33</sup>

Having identified a definitive test, the *Milošević* Chamber immediately clarifies how it will apply the test, saying it will acquit:

[w]here there is no evidence to sustain a charge... [; or w]here there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it ... even if the weakness in evidence derives from the weight to be attached to it, for example the credibility of a witness.... [; but w]here there is some evidence ... such that its strength or weakness depends on the view taken of a witness’ credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, [trial should continue].<sup>34</sup>

Sufficiency should be determined “on the basis of the evidence as a whole,”<sup>35</sup> but the Chamber also considers “the sufficiency of the evidence [for a given charge] as it pertains to elements of [that] charge[.]”<sup>36</sup> It was on this basis that the Chamber acquitted Milošević on hundreds of specific allegations while preserving each overall count.

In deciding, a chamber is obliged to take the evidence at its highest—to assume credibility unless it is utterly incapable of belief.<sup>37</sup> Discussing liability under a JCE theory, for example, the Chamber noted that it

will not make a final determination as to the one or the other basis at this stage, that is, whether to acquit the Accused at this stage of one or the other basis of liability. The reason is that a determination as to the Accused's liability depends to a certain extent on issues of fact and the weight to be attached to certain items of evidence, which calls for an assessment of the credibility and reliability of that evidence. These issues do not arise for determination until the judgement phase.<sup>38</sup>

The Decision consistently distinguishes between the Chamber deciding this case and “a Trial Chamber” when considering the standard of review: The *Milošević* Chamber will acquit only if *no* hypothetical reasonable trier of fact could convict—even if its judges already know they will not convict. The Chamber reiterates that “a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge[;]” it could acquit even if an accused called no evidence.<sup>39</sup> This will sound familiar to lawyers in the common law tradition, because it is the classic motion for “no case to answer” from *R v. Galbraith*, which the Decision quotes at length.<sup>40</sup>

The standard of review suggests the Decision's interim quality. If a chamber accepts a motion to acquit, this terminates proceedings—a consequential step that logically has the same effect as final judgment within the authoritative narrative model. But there is no valence to denying a Rule 98*bis* motion: Trial continues without prejudice to the sufficiency or meaning of the Prosecution's evidence, apart from the minimal gloss that it was not, in the most positive light, impossibly inadequate.

This doctrinal framework was clear. How then did those various actors react to the prospect, and then the fact, of the Decision? Did those reactions change when what was supposed to be interim became terminal?

## **IV. Asymmetrical Interests Surrounding the Decision**

The different parties had very different interests in the Decision. Obviously, they desired different outcomes, but they, and the judges, also had different institutional roles that created not merely divergent interests,

but asymmetries in how they interpreted and reacted to the Decision. Milošević's rejectionism was predictable, but for the *Amici*, Prosecution, and Chamber, the calculus was different: Their roles assumed the Tribunal's legitimacy. They needed to engage with the Decision substantively and procedurally, and had incentives to characterize it in particular ways to each other and the world.

### **A. The Accused's strategic nonchalance**

Milošević did not need to take a position on the Decision; any pronouncement by the Tribunal had no authority because to him the institution was illegitimate *ab initio*.<sup>41\*</sup> Despite this, Milošević took an increasingly active part in the trial<sup>42†</sup> and certainly had an interest in the Decision: Full acquittal would have been a vindication for him, and even partial acquittal would have brought the Prosecution's case into question.

Whether or not Milošević perceived the potential to undermine the Prosecution's case, his rejectionist strategy kept him from fully exploiting opportunities the Decision presented. For example, emphasizing that the Decision had acquitted him on some allegations would only have begged the question about all the others and the Chamber's authority. Milošević's grand strategy of public rejectionism encouraged him to a judicious silence;<sup>\*</sup> after all, Milošević was not asking the Tribunal for judgment.

### **B. The *Amici Curiae*'s imperfect identity**

The *Amici* could hardly ignore the Decision; they had actively sought the power to file the motion.<sup>43</sup> Thus, the *Amici*'s strategic position is conventionally contrasted with that of the Prosecution: seeking diametrically opposed outcomes, but in a structurally analogous position vis-à-vis the institution. In filing the motion for acquittal, the *Amici* appeared to be standing in for the Accused.

But to suppose that the *Amici* occupied the position normally filled by a cooperative defendant is not right because, as their name and the history of their appointment implies, the *Amici* were there to aid the Chamber. The Chamber first appointed the *Amici* when it became clear that Milošević was going to refuse counsel; their mandate was "not to represent the accused but to assist in the proper determination of the case" and to "assist



the Trial Chamber[.]”<sup>44</sup> Although the *Amici* could represent certain of Milošević’s interests, they were also circumscribed in that power and had obligations running to the Chamber; the *Amici* were far from true substitutes for the Accused, with whom they shared only an imperfect identity of interest.<sup>†</sup>

Consistent with their role as advisors to the Chamber, the *Amici*’s motion to acquit was restrained and neutral. They did not challenge the Prosecution’s core theory of liability and did not move for acquittal on all counts; instead, they challenged a narrower range of counts and charges for which the Prosecution had presented no evidence, which were charged under multiple counts,<sup>‡</sup> or which relied on a particular test or interpretation the *Amici* contested.<sup>§</sup> Only on Bosnia did they challenge more directly the Prosecution’s evidentiary basis—even then, apart from genocide, the *Amici* did not challenge entire counts, only specific allegations.<sup>45</sup>

The *Amici*’s brief “does not comment upon the sufficiency of the evidence called by the Prosecution on those counts upon which no submission to acquit has been made[.]”<sup>46</sup> Perhaps the *Amici* thought they were refusing to concede other matters, but of course, they were the ones deciding what to seek acquittal for. By not commenting, they all but ensured that everything else would be passed through to the defense phase. Boas calls the *Amici*’s “reticence” to challenge the Prosecution’s core theory “curious.... Perhaps the prosecution can consider itself fortunate this avenue was not pursued further.”<sup>47</sup>

Of course, neither an *amicus* nor a defense attorney should necessarily challenge everything. The question on a motion to acquit is not “will the evidence suffice,” but “might it suffice if uncontradicted.” An actor playing by the rules, as the *Amici* were, ought not challenge evidence that, on its face, requires a defense—and it might be unwise to do so. Playing by the rules, however, does not preclude pressing one’s advantage. The *Amici* did not conceive of their role this way. For example, regarding Sarajevo, the *Amici* challenged all but one sniping and one shelling allegation; leaving those in place ensured that, even if the Chamber accepted all the *Amici*’s arguments—as in fact it did—the counts would survive.<sup>48</sup> This appears, in fact, to have been the *Amici*’s intention.<sup>49</sup>

This restraint and neutrality—though a professional response to the *Amici*’s ambiguous structural position—undermines the utility of the Decision. If the *Amici* were constrained by their lack of identity of interest with Milošević, then it is unclear to what degree the Decision represents a robust adjudication in the way the Tribunal’s adversarial process supposes. Indeed, the consequences of the *Amici*’s imperfect identity with the Accused are all the more acute precisely because of the adversarial process, for which zealous defense is assumed and essential. A less adversarial process might make the disjuncture between defendant and friend of the court less disruptive of ICL’s narrative goals, but that would have required the ICTY to be formed on entirely different principles.

### **C. The Prosecution and its redline indictments—Denying effect**

The Prosecution approached the impending conclusion of its case and a possible Rule 98*bis* motion in an atmosphere of doubt. Acquittal on even a few counts in its flagship case could have been catastrophic for the Prosecution, and many observers thought the Prosecution had failed to assemble a compelling case on the critical genocide charges.<sup>50</sup> Still, the Prosecution could not openly contest the legitimacy of an adverse outcome; its options would have been restricted to procedural maneuvers and critiques of the Chamber’s reasoning, within a framework of institutional buy-in that compelled acquiescence. For the Prosecution, Milošević’s strategy of defiant nonchalance was simply not available.

Initially, the Prosecution placed its hopes on a Rule 98*bis* motion not being filed at all; they objected that the *Amici* were not “a party to the proceedings”<sup>51</sup> as the Rule requires.<sup>52</sup> When the Chamber rejected this preemptive strategy,<sup>53</sup> the Prosecution turned to a conventional defense of its case. Its approach was technical and correct, but far less conflicted than the *Amici*’s—conceding the absence of evidence on numerous allegations, but still urging the Chamber to maintain all counts.\*

After the Decision came down, the Prosecution undertook a rearguard action to contextualize the damage and preserve the scope of its case.<sup>†</sup> The Chamber ordered the Prosecution to produce redline indictments<sup>54</sup>—striking out allegations that were no longer part of the case—and it was

against this version that Milošević and assigned counsel defended.<sup>55</sup> The new versions<sup>56</sup> are mostly sober, technical realizations of the Chamber's instructions, but the Prosecution also added comments to justify marginal calls, which inevitably preserved allegations.

The *Amici* had challenged many specific allegations in the schedules attached to the indictment, but usually not the allegations in the main text, and the Prosecution used this fact to preserve mention of specific municipalities in the main text for several counts.<sup>57</sup> For a persecutions count from Bosnia, for example, the Chamber ruled that allegations for three named municipalities in the schedules lacked evidence; nonetheless, the Prosecution did not line them out in the main text, arguing that “[i]n the Prosecution’s opinion[,] findings of insufficient evidence in relation to the Schedules of the Bosnia Indictment do not necessitate the deletion of [those] municipalities ... as the allegations contained in [the main text] are broader than the specific allegations contained in the Schedules.”<sup>58</sup>

The most striking changes are to the Sarajevo sniping and shelling counts. As we have seen, the *Amici* challenged 43 sniping and 26 shelling incidents, leaving just one of each—the shooting of Seid Solak and the notorious *Markale* incident that killed 66 people. The Prosecution conceded that all the other incidents lacked specific evidence, but argued that “‘overview evidence’ of a shelling and sniping campaign in Sarajevo ... is sufficient” for conviction.<sup>59</sup> The Chamber rejected that argument and ordered acquittal on all except the incidents not challenged by the *Amici*.<sup>60</sup>

Still, although it had to redline these incidents, the Prosecution was able to preserve the original chapeau, describing the

killing and wounding [of] thousands of civilians of all ages and both sexes.... an extensive, four-month shelling and sniping attack ... a protracted campaign of shelling and sniping.... [against] civilians who were, amongst other things, tending vegetable plots, queuing for bread or water, attending funerals, shopping in markets, riding on trams, [and] gathering wood.<sup>61</sup>

The chapeau even continues to note that “[s]pecific instances of sniping are described in Schedule E.... Specific instances of shelling are set forth in Schedule F.”<sup>62</sup> The instances are still there—with lines through them. No changes appear in the main text, however, and anyone reading the indictment would not notice anything.



The Prosecution also preserved the seven overlapping counts—murder (as a crime against humanity and a violation of the laws or customs of war), inhumane acts, willful killing, willfully causing great suffering, cruel treatment, and attacks on civilians<sup>63</sup>—above an allegation set now consisting of two incidents. This is entirely correct—it is possible to characterize a single incident multiple ways—but it is also extraordinarily hollowed out. As the Chamber did not consider the Prosecution’s “overview evidence” sufficient to preserve the other sniping and shelling allegations, what exactly remained aside from the single pleaded instance of each? Yet, the preservation of all counts—and the original text—masks this, leaving the impression that nothing has changed, that no doubt or qualification has entered the juridical calculus.

The Prosecution encouraged this impression by suggesting that the redline indictments are not amendments at all, but only

working documents of value to clarify the case that the Defense has to meet. It may be thought that the Croatia and Bosnia Indictments should remain unchanged from the moment that the Prosecution case closed in order to best assist the parties and the public to be able to assess what was alleged, what was the subject of acquittal by the Trial Chamber and what (if any) counts are the subject of convictions in due course.<sup>64</sup>

This is technically unobjectionable, but also asserts a mystifying continuity between the original indictment—containing allegations on which Milošević had been acquitted—and the subsequent revision. At the time, all this was done to preserve options for trial, but later it would serve a different purpose.

## **D. The Chamber—Pointlessness and assymetry**

For the Chamber, the Decision’s legitimacy was not in question; the judges had no interest in minimizing the effects of a document they had written. Their concern was with its impact on the trial and the ICTY’s jurisprudence—in particular, how the Decision affected other Rule 98*bis* proceedings. One judge’s subsequent behavior suggests he was appalled at what they had produced, and took steps to avoid a repetition.

### **1. The pointlessness of Rule 98*bis*—Robinson’s separate opinion**



The most significant tension arising in the Decision involves the role of judges as the ultimate trier of fact. As we have seen, the Decision discusses at length the relationship of Rule 98*bis* to the claim of no case to answer. This is an example of common law influence, yet the rule produces a very different dynamic with very different implications at the ICTY.

The judges felt it important to distinguish Rule 98*bis* from its antecedent, owing to a key structural difference between the ICTY and the common law: the lack of a jury. In the common law, the jury is normally the trier of fact,<sup>65</sup> while the judge acts as the trier of law. The Decision notes that “an essential function of the [common law] procedure is to ensure that at the end of the [p]rosecution’s case[,] the jury is not left with evidence which cannot lawfully support a conviction[.]”<sup>66</sup> But this protective function has limits: “a judge must not allow a submission of no case to answer because he considers the prosecution’s evidence to be unreliable, [because] by doing so he would usurp the function of the jury....”<sup>67</sup>

Even though the Decision discourses at length how the common law rule protects the jury’s role, it does not actually mention the obvious disjunction that there are no juries at the ICTY. Only in his separate opinion does Judge Robinson note that

in principle, there is far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law jurisdictions.... [S]urely the fact that a Trial Chamber is composed of professional judges, whose need to be insulated from weak evidence is not as great as a lay jury, must make a difference....<sup>68</sup>

Robinson adduces the possibility of a different rule from the ICTY’s different structure. As it turns out, his agenda is to cut back Rule 98*bis*, leaving more to the judgment phase:

Charges at the Tribunal are multilayered to a degree that is generally not present in indictments at the domestic level.... Is it useful to devote the Tribunal’s resources to an exercise which may result in the elimination of a dozen of these hundred or more individual allegations or details ... while the charge or count remains intact? Is there any prejudice to an accused in leaving those dozen individual allegations for consideration ... at the judgment phase?<sup>69</sup>

He therefore suggests restricting Rule 98*bis* to submissions

designed to eliminate a charge or count rather than individual allegations ... [and] that allege that there is no evidence, as distinct from insufficient evidence[.]<sup>70</sup>

Robinson's critique rests on claims about judicial economy and judges' professional perspective.<sup>71</sup> We might question this: Although much effort would be saved at the midpoint of trial, the defense would feel compelled to address every allegation in its phase, as it would not know if the judges thought them strong or weak. Perhaps Robinson's view is a function of his frustration at having just waded through the entire Rule 98*bis* process: The enormous, tedious<sup>\*</sup> Decision took months to write, but then Robinson never got to final judgment, when—had his preferred approach been in place—those claims would have reappeared.<sup>†</sup>

Surely the more relevant factor is that ICTY judges are the ultimate trier of fact. Concern with usurpation of the jury's function is irrelevant in the ICTY's unitary model—not, as Robinson supposes, because of judges' skill, but rather the total identity between judge and jury. The Chamber would only be usurping itself, so the Rule 98*bis* “no case to answer” motion is, in a sense, a solution without a problem. It is not the judges' professionalism, but their position, that makes Rule 98*bis* pointless. Still, well thought out or not, this signals that the judges are *not* signaling their own view about the evidence's sufficiency.<sup>72</sup>

## **2. Predictive asymmetry—Kwon's dissent**

The Decision preserved all counts, but Judge Kwon dissented on genocide under a JCE I theory. JCE I requires that an accused actually possessed the special intent necessary to commit genocide. The Chamber accepted that the Prosecution had supplied sufficient evidence to continue with that charge, but Kwon disagreed.<sup>73</sup> He did not dissent on other theories (such as JCE III, aiding and abetting or complicity) that contemplate liability even if an accused merely knows about or foresees genocidal harm, but he did not believe it was reasonable to infer Milošević's own intent from the evidence.<sup>74</sup>

Kwon's dissent did not affect the outcome of the Decision, but it delimits elements of a putative final judgment, because of the asymmetrical information embedded in a Rule 98*bis* decision. Denying a motion continues the trial, but acquittal has a clear, incontrovertible

meaning. We cannot know how the other two judges would ultimately have ruled on JCE I liability, but unless there was new evidence in the defense phase, we can be certain about Kwon: It is difficult to see how Kwon could *not* have acquitted on any theory requiring Milošević to have actual genocidal intent. Whether Kwon's view would have commanded a majority or not, we cannot know; the very limited information in the Decision does not work in that direction.\*

...

Though neither they nor anyone else could know it then, the Decision was—or rather turned out to be—the judges' last major statement on the evidence. In time, this made it into something more than its authors originally anticipated. Its appeal as a source for narrating the events of the Yugoslav wars turned out to be as considerable as it was doctrinally implausible—for the very feature that makes the Rule 98*bis* procedure pointless is the same feature that later made it seemingly attractive for the authoritative narrative theory.

It is precisely the total identity of interest between the ICTY's triers of fact and law that makes the Decision potentially appealing. A decision to continue a case at the ICTY might be thought to signal a likely final outcome with greater confidence than a similar decision in the common law. Because the judges hearing a Rule 98*bis* motion are the same ones who will decide the case, it was, and is, tempting to suppose one could read a great deal about the meaning of a terminated trial into an interim pronouncement. But as almost everyone who later attempted to use the Decision this way was compelled to conclude, this seeming value is deceptive.

## **V. The Ambiguity of Potential: Invoking the Decision after Milošević's Death**

When Milošević died in March 2006, the Decision—an interim document that ordinarily would be superseded—suddenly gained a potential prominence in the vacuum of indecision and inarticulation. For some, it became a kind of judgment.

A realistic assessment of the Decision's effects must take into account all uses, and the Decision's deployment in other cases and by other courts—however logically suspect—is its own proof of influence. Still, the doctrinal weakness of these uses—evident in the tentativeness with which even those most eager to deploy the Decision do so—exercises its own constraint on the Decision's utility as an ersatz judgment. Normally, realism encourages a skeptical attitude toward doctrine, but here we see how doctrine constrains the uses for which the Decision can be plausibly deployed; not just any argument will do.

### **A. Characterizing the Decision as judgment—Del Ponte's press conference**

In her press statement following Milošević's death, the Chief Prosecutor invoked the Decision in the context of a mountain of evidence and a nearly completed trial:

I deeply regret the death of Slobodan Milosevic. It deprives the victims of the justice they need and deserve.... During the prosecution case, 295 witnesses testified and 5000 exhibits were presented to the court. This represents a wealth of evidence that is on the record. After the presentation of the prosecution case, the Trial Chamber ... rejected a defense motion to dismiss the charges for lack of evidence, thereby confirming, in accordance with Rule 98*bis*, that the prosecution case contains sufficient evidence capable of supporting a conviction on all 66 counts. The Defense was given the same amount of time as the prosecution to present its case. There were in total 466 hearing days. 4 hours a day. Only 40 hours were left in the Defense case, and the trial was likely to be completed by the end of the spring.<sup>75</sup>

Almost everything here is accurate.\* Claiming the trial was nearly over, besides heightening the poignancy and sense of waste, accords the Decision an aura of considerably greater finality than even Del Ponte would have assigned it just the morning before, let alone when it was issued. Everything needed was available—just a few hours missing. This is a half-truth, yet what is interesting is the implication: Del Ponte simultaneously acknowledges what she must—there will be no verdict—and claims that nonetheless there can be. Observers could make their own.

Considering the Prosecution's earlier, assiduous efforts to render the Decision as invisible and inconsequential as possible, this public invocation is ironic. It also suggests the Prosecution understood the



Decision's strategic possibilities—its potential to lend an air of finality—even while being compelled to acknowledge the Decision's doctrinal limitations.

## **B. Treating the Decision like a judgment—The ICJ's *Bosnian Genocide Case***

Just under a year later, the ICJ rendered its judgment in the *Bosnian Genocide case*,<sup>76</sup> which had acquired even greater salience as an implicit second chance to demonstrate Milošević's responsibility.<sup>77</sup> The ICJ acknowledged the "unusual feature" that "[m]any of the allegations before this Court have already been the subject of the processes and decisions of the ICTY."<sup>78</sup> Thus, when the ICJ ruled that Serbia had not committed genocide,<sup>79</sup> its failure to acquire all the evidence from *Milošević*—in particular, minutes of the VSO—became a focus for frustration.<sup>80</sup> But what, if anything, could the ICJ have done with the *Milošević* Decision's review of evidence?

The *Bosnian Genocide* judgment extensively discusses the value of evidence from the ICTY. Although not a criminal jurisdiction, the ICJ applied a high standard of proof: "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive."<sup>81</sup> It considers the ICTY's "fact-finding process" to be of the kind that "falls within [its preferred] formulation, as 'evidence obtained by examination of persons directly involved,' tested by cross-examination, the credibility of which has not been challenged subsequently."<sup>82</sup>

The ICJ also expressly discusses the evidentiary value of Rule 98bis decisions.<sup>83</sup> It accurately paraphrases the *Jelisić* (and *R. v. Galbraith*) standard that such decisions only mean a court could convict, not that it would, and notes that the *Krajišnik* Chamber ultimately acquitted on genocide after having dismissed a Rule 98bis motion.<sup>84</sup> The ICJ then draws the critical conclusion: "Because the judge or the Chamber does not make definitive findings ... the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met."<sup>85</sup> Evidence from the ICTY is not enough, interim evaluations are not enough—only final judgments are definitive.<sup>86</sup>

Having set the bar high, the ICJ promptly limbos under it, citing the *Milošević* Decision several times. Here the judges consider if members of a group protected under the Genocide Convention were killed:

In the *Milošević* Decision..., the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses, it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings.” [and] “The witness personally moved about [twelve to fifteen] bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies.”<sup>87</sup>

Three paragraphs later, they reach their finding:

On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia ... were perpetrated.... The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and ... the requirements of the material element ... are fulfilled.<sup>88</sup>

Similarly, the ICJ invokes the Decision to discuss the Manjača Camp in deciding if Serbia “caus[ed] ‘bodily or mental harm’ within the meaning of the Convention.”<sup>89</sup>

These two camps were hardly the only incidents the ICJ considered. It is the fact that the ICJ’s judges used the Decision at all, however, and precisely in this pedestrian way, that is of note. Surrounding the ICJ’s citation of the Decision’s Luka Camp review are citations to judgments in *Brđanin*, *Krnojelac*, *Stakić*, *Nikolić*, *Sikirica*, and *Jelisić*, the report of the Commission of Experts, and General Assembly and Security Council resolutions.<sup>90</sup> The ICJ treats the Decision exactly as it does final judgments: To the degree the ICJ’s finding “by overwhelming evidence” is built upon the Decision, it overreaches, but also grants a retrospective authority to the Decision.

The ICJ even reached right past the Decision, directly back to testimony from the trial:

The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he

had had with Milošević during the negotiation of the Dayton Agreement...

...

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation with a massacre.” The ICTY record shows that Milošević denied ever making the statement ..., but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision....<sup>91</sup>

The Chamber indeed discussed General Clark’s testimony, but it is a clear misreading of the Rule 98*bis* process to say that the Chamber “relied on” it in any definitive sense; yet the ICJ assumes the testimony has probative value because it has been laundered through the Decision.\*

The ICJ first announces a strict, skeptical standard forbidding reliance on anything but final judgments, but then reads profligately from Rule 98*bis* decisions.<sup>†</sup> In a way, it is a formalistic game: The ICJ could cure the defects in its discussion simply by considering the Decision’s evidence as its own, rather than as a derivative product of another court; it could have simply asked itself what it thought Clark’s statement meant, or heard Clark directly as a witness—or, for that matter, demanded its own copy of the VSO minutes from Serbia.<sup>92</sup> But this solution merely returns us to the theme that evidence either has intrinsic value or not, but acquires none at trial until that process characterizes it in some definitive way. The ICJ standard confirms precisely that logic, which it then fails to follow.<sup>‡</sup>

### **C. The obligation of possibility—Academic critique of the ICJ judgment**

In a scholarly article, a former ICTY prosecutor, Dermot Groome, offers a searching critique of the ICJ’s failure to more fully consider evidence from *Milošević*.<sup>93</sup> Groome’s critique is premised on the significance of the Decision, however, demonstrating the creative, if limited, repurposing to which its “sufficient evidence” standard can be put.

Groome surveys the evidence concerning Milošević’s role as the pivotal figure in Serbian politics and the relationship of Serbia to genocide in Bosnia, and, while admitting that the Decision “carries none of the weight of a final judgment[,]”<sup>94</sup> sees significance in the fact that the Prosecution’s case met the Decision’s standard of review. The evidence

should have similar potential for the ICJ case, and that possibility implies an imperative:

[G]iven the Milošević trial chamber's finding that there was sufficient evidence upon which a court could find Milošević guilty of the crime of genocide...a thorough inquiry into Bosnia's claims before the ICJ *required* the ICJ to examine the evidence referred to in the [Decision] to adjudicate the case before it.<sup>95</sup>

This is possibilitative argument—that a thing is necessary merely because it is possible—making the interim Decision a mandatory writ for another review. Groome, an accomplished lawyer, admits what he must; his desire to deploy the Decision leads him to adopt an essentially procedural move, as the doctrinal structure leaves no other option. Groome rightly notes that the ICJ would have been hard-pressed to find Serbia at fault if the Decision had acquitted Milošević;<sup>96</sup> the Decision's actual, ambiguous outcome—continuation of trial—does not yield an equivalent, opposite obligation.

#### **D. Extracting authority from the Decision—The ILA Conference report**

The judges who wrote the Decision were also concerned with its institutional effects on the Rule 98*bis* process, so one way of reading the Decision is as an influence on ICL jurisprudence. A conference of the International Law Association (ILA) illustrates how one can extract authoritative text from a terminated trial, but equally suggests the limits of that effort.

The ILA Conference Report, on the rules for the use of force, relies on the Decision to formulate the definition of armed conflict.<sup>97</sup> The Report notes that the Decision favors the approach taken in *Tadić* over the more restrictive view in the ICRC Official Commentary to Common Article 3.<sup>98</sup> This is a consequential difference—but the point is that in building its case, the Report is not constrained by the Decision's interim nature because when the *Milošević* judges discuss legal tests, they speak in their own voice, and the strictures of Rule 98*bis* relax.

In the section the ILA Conference Report relies on, the Chamber—after noting the *Amici*'s contention that there was no armed conflict in Kosovo before 24 March 1999—discusses the Tribunal's jurisprudence for



seven paragraphs, during which a single, trivial mention is made of the Prosecution's and *Amici*'s views, and none of evidence.<sup>99</sup> The analysis is not couched in the hypothetical language of what *a* trial chamber *might* decide; instead, "[i]t is settled in the International Tribunal's jurisprudence," "[t]he Trial Chamber makes the following observations on the Tadić test" and so forth.<sup>100</sup>

Other sections of the Decision demonstrate a similar pattern. In the discussion of deportation and forcible transfer, there are more mentions of Prosecution and *Amici* disagreements, but the overall tenor is the same—the Chamber is speaking in its own voice.\* Likewise, the Decision notes the *Amici*'s contention that the mens rea for genocide and command responsibility cannot be reconciled, but then says that "[o]n the basis of the Decision of the Appeals Chamber in ... *Brđanin*, this submission is unmeritorious."<sup>101</sup> The Chamber is not simply considering if the Prosecution's preferred rule could be applied by a reasonable judge; instead, it is dismissing the *Amici*'s view on the merits. Other Rule 98bis decisions display a similar confidence when deciding legal tests.<sup>102</sup>

This is the most confident language in the Decision, and consequently the most authoritative basis for relying on the Decision because the Chamber is expressing its actual view.<sup>103</sup> Of course, where the Decision is most authoritative is also where it is most anodyne, regurgitating legal standards with long pedigrees in other cases. In the discussion of mens rea, for example, the Chamber dismisses the *Amici* by citing *Brđanin*,<sup>104</sup> and this is typical.<sup>105</sup>

Logically, Rule 98bis decisions are the best place to change the law on how Rule 98bis decisions are made. But this only shows the Decision's authority is greatest on a circumscribed set of legal and procedural issues that do not engage with the factual evidence of responsibility, let alone questions of shared narrative—which is to say, with the putative purpose of the entire exercise. The authoritative narrative theory relies on the procedural integrity of the trial process, but this does not mean it is concerned only with process—in the end, the theory rises, or falls, on the stories it tells about what happened. These are claims about the substance of judgment.

## **E. Doctrine's constraint—The Decision's structural inadequacy**

The postmortem deployments of the Decision have been limited and cautious. Some actors have tried to mobilize the Decision as a kind of ersatz judgment, but these efforts feel halfhearted, constrained by the doctrinal straitjacket Rule 98*bis* creates; even its most ambitious advocates acknowledge that the Decision is not a verdict. For anyone who has ever felt the pull of the most skeptical, critical views of law—that nothing drives legal analysis other than actors' preferences—the Decision's restrained deployment is a bracing riposte, a reminder that text, process, and doctrine matter. The very fact of this restrained nonuse—by actors with evident convictions about Milošević's guilt—suggests the limited utility of anything other than final judgment in constructing claims that rest on judicial authority.

In particular, there is a notable absence of claims that the Decision—really, the *Milošević* trial in general—has contributed to an authoritative narrative, despite the hopes ringed round what was the most important of the ICTY's trials. That advocates of the authoritative narrative school did not pick up the Decision and make more of it suggests they did not think it would advance their goals. Either they were uncomfortable with its specifics—concerned that it might point toward acquittal\*—or they recognized that this less-than-judgment was structurally inadequate.

If a trial reaches final judgment, no one is terribly concerned with interim decisions; it is only when a trial is terminated that they assume retrospective importance. This suggests a mismatch between an interim document's initial design and its later deployment. The Decision was not built to bear the load of final judgment, and using it for that purpose stresses the unfinished edifice. Logically, this is true for any evaluation of fact produced in a trial that ends before judgment.† Formal, legal authority may or may not do what its advocates claim; in terminated trials, it surely cannot.

For what does rejection of a claim under Rule 98*bis* mean? Accepting a motion to acquit is undeniably consequential, yet rejecting a motion to acquit does not have an equally unambiguous impact: Apart from its discussions of legal standards, not a single piece of factual evidence deployed in the Decision can be confidently assigned a definitive value,

except those the Chamber rejected as insufficient. All we can know about this evidence—as an element of the Decision—is that it was not so insufficient, so ludicrous, as to compel the Chamber to acquit. If it is to contribute to a transformative narrative and to reconciliation, that evidence will have to be deployed in other ways, according to other theories about how communities reach consensus and reconcile after war.

## VI. The Limits of Judgment

### A. Authority after death—Nonlegal narratives

The radically limited utility of the Decision does not mean a terminated trial cannot contribute to reconciliation in any way. Advocates of the narrative theory rarely argue that a single trial yields the full truth. The events of *Milošević* have been adjudicated in other cases before the ICTY that both rely on related evidence and cast light on issues *Milošević* did not resolve.<sup>‡</sup> More broadly, processes outside of the legal system may have greater flexibility in deploying the evidence and Decision: Independent analysis and historiography produce narratives that can do as much informational and persuasive work as legal judgment.

The Human Rights Watch report *Weighing the Evidence* provides a strong example of the claim that the trial process has independent value. *Weighing the Evidence* cites extensively from the trial evidence to build an argument about what happened during the Yugoslav wars and who was responsible. The report describes its own standard of review:

Human Rights Watch did not attempt an exhaustive review of the evidence introduced a [sic] trial. Human Rights Watch did consider Milosevic's cross-examination and defense and we did not include evidence where we felt Milosevic had raised valid questions in rebuttal as to the value of the evidence.\*

The report reviews the evidence de novo, not filtering it through the Decision, although it often could have.<sup>†</sup> This asserts the autonomous value of the evidence, evaluated without reference to the Chamber's formalistic standards. In theory, an outside observer could disagree with the Decision: Even if the Chamber threw out an allegation, Human Rights Watch could



in effect reinstate it through its own analysis; equally, it could acquit Milošević on a count the Chamber had upheld.<sup>‡</sup>

Likewise, accounts of the trial, such as Boas' and Armatta's books,<sup>106</sup> which draw on the formal evidence but also analyze the trial process, produce accounts that may in time embed themselves in popular memory as definitive retellings of Milošević's responsibility. So far these works have been produced by insiders or close observers, but the *Milošević* archive also is—or might be<sup>§</sup>—a rich source for historians to construct accounts that might acquire a kind of authority. Through these the trial could contribute to the processes the authoritative narrative theory contemplates: "In time, evidence introduced in the Milošević case may go some way toward vindicating these hopes [for recognition of crimes in Serbia]. Scholars and non-governmental organizations have begun what will likely be a long process of reclaiming that evidence and establishing non-judicial processes of learning from it."<sup>107</sup> Even if the theory in its pure form cannot extract value from a terminated trial, other narrative forms may be efficacious.

But whatever their effects, advocacy and scholarship will of necessity contribute to a different genus of authority than the specific kind supposedly afforded by judgment. Such work demonstrates both what can be achieved through private evaluation of evidence and its limits, which are defined precisely by the lack of authoritative imprimatur. Anyone can review evidence; it is not the facts but their legal characterization that matters to the particular kind of authoritative narrative ICL is supposed to produce. Historians and legal scholars can reinterpret evidence and even contest authoritative rulings, yet claiming too much for lay reinterpretation undercuts the original argument for trials, which is that legal decisions contribute specially to narrative and reconciliation. An outcome arrived at without going through the forensic processes of trial does not, by definition, create the particular effect with which we are concerned. In this sense, other approaches simply recapitulate the problem of authority.

## **B. Neither in death nor in life—Justice without transformation?**



The constricted horizons of the *Milošević* trial certainly suggest the tenuous nature of ICL's immature project: so much depending on a single trial whose outcome depended on the health of a single defendant. Still, precisely because ICL is a young project, it is difficult to reach confident, empirically grounded conclusions about its effects. A terminated trial such as *Milošević* clearly cannot accomplish what the authoritative narrative theory expects; what is still not clear, however, is whether even final judgments can.

The two most critical features of the Decision are its interim quality and the trial's termination; it would overreach to derive from them a claim about the effect of *final* judgment. However, this chapter's inquiry into the relationship between terminated trials and the authoritative narrative theory does make two useful contributions to framing an investigation of that broader question, by removing some confounding factors from the puzzle of narrative reconciliation's absence.

First, a close explication of the Decision shows just how structurally insufficient anything other than final judgment is for the creating authoritative narrative. If narratives of the kind the theory predicts were generated by other parts of a trial, their influence should be visible even in terminated cases, but it is not. Final judgments are the only plausible locus for further investigation of the narrative theory's effects.

Second, this chapter further clarifies that investigation's proper scope, because termination cannot be the only reason for the more general failure of reconciliation in the former Yugoslavia and the paucity of evidence for the effects the authoritative narrative theory predicts. If *most* trials ended prematurely, we might suppose this was limiting ICL's reconciliatory effects. But although terminated trials are an endemic problem, they are not the norm; most trials reach final judgment, and therefore should have done something.

We ought to be skeptical about the special ability of international trials to create or contribute to transformative narrative. This chapter has focused on the specific problem of terminated trials' incapacity to produce authoritative narrative, but in doing so it also defines the parameters of the general theoretical question toward which the Decision points us, which concerns the authoritative narrative theory itself. The Decision—that imperfect, interim document—by its very imperfection suggests the need

to examine the sufficiency, not of its own transformative potential, but of the idea itself.

## Beyond the Theater of International Justice

The Rule 98*bis* Decision in *Milošević*

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*What is the meaning of the 2004 Decision on the Motion for Judgment of Acquittal in the Milošević Trial? Drawing on Jürgen Habermas' procedural theory of law, this chapter argues that the Decision was critical to re-legitimizing the contentious proceedings. The value of the Decision lies in having eschewed an incontrovertible verdict, and in drawing our attention to the complexity of the ICTY's procedural and substantive law. By having reined in, if only temporarily, the theater of international justice that Milošević had become, the Trial Chamber's preliminary assessment of the Prosecution's case bespeaks international adjudication at its best.*

### I. Between Facts and Judgment

Late in the spring of 2004, the *Milošević* Trial Chamber took stock of the evidence the Prosecution had marshaled in the trial, in its Rule 98*bis*

Decision on the Motion for Judgment of Acquittal.<sup>1</sup> By that time, five years had passed since the initial indictment, a little less than three years since the FRY had transferred the world's most infamous fugitive to the ICTY. What are we to make of this document? What difference, if any, did it make to the courtroom drama unfolding in The Hague?

If the *Milošević* trial had run its course to completion, little mention would be made of its Rule 98bis Decision. Yet because the proceedings terminated prematurely with the death of the defendant, an unusual amount of attention has been paid to this 140-page document. For some observers, the Decision constitutes what Waters calls an “ersatz judgment”<sup>2</sup> that in retrospect became hugely significant in the absence of a final judgment, “deployed to tell a story about Milošević’s guilt or innocence and craft a final judgment in the eyes of the world, if not in law.”<sup>3</sup>

It would certainly be wrong to liken the *Milošević* Trial Chamber’s Decision to a legal judgment: The Decision was not intended to be a substitution for a judgment, and it must not be read as such in retrospect. The purpose of Rule 98bis is radically different from the rules and procedures of evidence governing a final verdict. As Waters writes, “Apart from its discussions of legal standards, not a single piece of factual evidence deployed in the Decision can be confidently assigned a definitive value, except those the Chamber rejected as insufficient.”<sup>4</sup> Still, although for Waters this makes the Decision radically indeterminate, it does not mean the Rule 98bis Decision is insignificant. Quite the contrary—for, at the time the Decision was announced, the *Milošević* trial was on the precipice of legitimacy, and the judges seized, perhaps unwittingly, the last opportunity that presented itself to them.

The value of the Decision lies in having eschewed an incontrovertible verdict, and in having drawn attention to the complexity of the ICTY’s procedural and substantive law. In many respects, the Trial Chamber’s preliminary assessment of the Prosecution’s case bespeaks international adjudication at its best. Instead of offering the typical ICTY fare in Rule 98bis decisions of “brief rejections without much reasoning or analysis[,]”<sup>5</sup> Judge Robinson and his colleagues produced an extensive, exhaustive discussion. By drawing attention to key failings of all parties to



the trial, the Decision established a robust judicial standard by which to adjudicate the reality of international crimes.

This didactic juncture in the trial is noteworthy because it marked the Trial Chamber's successful attempt at "demonstrating the justice of its own process[,]""<sup>6</sup> and illuminating the admittedly limited function of international law in times of conflict. By navigating carefully between facts and norms, the Chamber lent a modicum of legitimating force to adjudication at the ICTY. When viewed through the lens of the philosopher Jürgen Habermas' procedural theory of law, the very fact that the Decision was not ultimately determinate presented a valuable opportunity for the Tribunal as an institution. The *Milošević* Chamber, "by meeting its need for legitimation with the help of the productive force of communication," took advantage "of a permanent risk of dissensus to spur on legally institutionalized public discourses."<sup>7</sup>

Instead of filtering history and memory into the courtroom, as some proponents of so-called didactic trials—what Waters terms the authoritative narrative theory of ICL—advocate, the ICTY trial judges filtered more law into it. They reminded all parties to the proceedings of the core function of international trials, which Hannah Arendt once described as the imperative "to weigh the charges brought against the accused."<sup>8</sup> The dry tone of the Decision, and its overall careful and comprehensive parsing of both Prosecution and Defense positions, proved an important counterpoint to the spectacle of international justice that the proceedings against Milošević had become by that stage. It restored, in more respects than one, the proper decorum of the ICTY courtroom, and laid the foundations for a didactic courtroom—a courtroom in which international procedural justice is seen to be done.

The Decision thus marks a critical juncture in the development of the *Milošević* proceedings. It is a valuable document that sheds important light on the quality of international adjudication. Indeed, the judges' mostly careful reasoning at this interim stage of the proceedings largely succeeded, if only temporarily, in turning Courtroom I from a theater of international justice back into a court of international justice.

## **II. The Theater of International Justice**

As international trials go, the *Milošević* proceedings were imbued with drama from beginning to end. The high profile of the Accused assured this, but so did his controversial insistence on self-representation, his continued refusal to concede the Tribunal's authority, and his prolonged ill-health and sudden demise. To the displeasure of Judge May, who presided over the trial until his retirement in May 2004, just before the Decision was issued, Milošević sought to delay, obstruct, and ridicule international justice at every turn. As one of May's colleagues described it:

Milosevic constantly interrupted counsel and witnesses; corrected interpreters; defied authority of the tribunal or the judges; refused to comply with orders to disclose materials, file witness lists or produce experts; eschewed written submissions, insisting that only oral evidence was appropriate in a public trial; required for health reasons a minimal courtroom schedule (four hours a day, three days a week); ignored repeated admonitions by judges not to ask leading questions; sought to introduce irrelevant information into the record; and played blackmail with the court by getting defense witnesses to refuse to appear if he could not examine them himself.<sup>9</sup>

The Prosecution also struggled with Milošević's self-serving performances on the international legal stage. In her memoirs, Del Ponte described the beginning of the Defense phase, shortly after the Rule 98*bis* Decision:

... Courtroom I sprang to life once again as Milosevic began presenting his defense case. True to form, he mounted no legal defense in the conventional sense. Rather, he chose to dabble in politics and to make speeches to his true believers in Serbia and elsewhere about his interpretation of Yugoslavia's demise.<sup>10</sup>

And yet it was not only Milošević who contributed to the theater of international justice in Courtroom I. Del Ponte's Prosecution displayed a penchant for overreach and enabled some of the pathologies that in the minds of many have become synonymous with the *Milošević* trial. As the Introduction discusses, foremost on the list of pathologies is the mega-case that the Prosecution insisted on bringing against the Accused: 66 separate counts, seven thousand allegations, in three different conflict zones over eight years; over one million pages of evidence, over one thousand exhibits and videos; a transcript running tens of thousands of pages; 64,000 pages of filings; 133 live witnesses for *Kosovo* alone, 195 for the other phases. And this was the more modest case that the Chamber

imposed; initially, the Prosecution had proposed to call one thousand witnesses, an unfathomable number.

Though less openly combative than Milošević's methods, the Prosecution's strategy was, in its way, an equally theatrical use of international law. Although the prosecutors were certainly entitled to bring a comprehensive case against one of the most reviled war criminals of the post-World War II period, from the vantage of procedural justice, their decision to try to implicate Milošević as widely as possible looks unconvincing in retrospect. It suggests that the Prosecution had succumbed to an overly ambitious logic, disregarding the costs of substituting a comprehensive strategy for a tightly focused forensic one.

And while the tedious length of the trial both slowed the delivery of justice and drained away interest\*—hardly the goal of good theater—such overwrought indictments can also produce unintended consequences:

Excessively long trials that follow in the wake of unnecessarily broad indictments ... also increase the irritability of the accused, the lawyers, and even the judges, eventually giving way to public expressions of their frustrations and emotional distress.... Psychologically, the drain on all participants of months and months of courtroom bickering cannot help but lower their tolerance points and make more likely ugly exchanges, name-calling, and dramatic gestures, all of course reported in the news and on television for shock value and head shaking.<sup>11</sup>

In the *Milošević* trial such dramatic gestures were the order of the day. Throughout the trial, the defendant railed against the Tribunal. On several occasions, when the defendant had exhausted Judge May's tolerance, May ordered Milošević's microphone to be switched off.

A year after the death of Milošević, Judge Kwon insisted that "the most effective measure for tackling the problem of lengthy trials would be to limit the number of charges in the indictment themselves. With a more focused indictment, the production and analysis of crime-base and linking evidence would be a much speedier process than it currently is in the majority of the cases at the Tribunal."<sup>12</sup> As we shall see, the Rule 98bis Decision, which Kwon coauthored, was a first step in this direction. Although the proceedings reverted back to the theater of international justice when Milošević commenced his defense case in September 2004, the Trial Chamber's effort to streamline the ICTY's most challenging and visible trial is remarkable even in retrospect.



### III. The Promise of International Legal Procedure

The Rule 98*bis* Decision pulled *Milošević* back from the abyss of a tendentious political trial. It reestablished the supremacy of international law, and notably of international legal procedure. The three-member Chamber rescued the Tribunal's major trial—at least temporarily—from the performative antics of *both* the Prosecution and the Defense. The Chamber pushed back against the challenge from the *Amici Curiae* and the Accused's theatrics by defining sensible legal standards against which the factual evidence had to be measured, while at the same time it cut the Prosecution's sprawling case down to size.

The judges' tentative review of the evidence announced in June 2004 was a mostly competent analysis of the case to date. Despite the fact that journalists and scholars criticized Robinson, a former career diplomat, for his occasional lack of control in the courtroom, he deserves credit for helping to rein in the scope of the Decision. The judges' comprehensive stocktaking addressed and answered, preliminarily, important legal questions that drove the trial. Thorny questions at the heart of the Decision touched on the existence of an armed conflict in Kosovo, the legal distinction between forcible transfer and deportation as crimes against humanity, and the nature of statehood in Croatia.<sup>13</sup> These were matters of great importance in *Milošević* because they addressed the application of the ICTY's substantive law to the plethora of crime scenes in the indictment. Although much of the subsequent discussion about and mobilization of the Decision has revolved around the factual evidence, it is the legal standards that provide the frame in which those facts matter, and the Decision set clear standards in this respect. Even Waters, who is generally skeptical about the value of the judges' views in the Decision, acknowledges that it is precisely on these matters—on questions of legal interpretation—that the Chamber speaks with greatest confidence, clarity, and reliability.\* Indeed, it is also on such matters that its comments were most consequential.

A major contribution of the Decision to the expeditious administration of justice was its pruning of the charges and crime scenes contained in the *Milošević* indictment. Although the Trial Chamber “found sufficient evidence to support each count challenged in the three Indictments,” in



fact it dealt a serious blow to the Prosecution, for at the same time it held “that there is no or insufficient evidence to support certain allegations relevant to some of the charges[.]”<sup>14</sup> Scores of challenges to the Prosecution presentation of the case against Milošević were granted; altogether, 130 alleged crime scenes were purged. As Boas writes in his book, “Despite the very low evidentiary threshold to establish a charge at the judgement of acquittal stage, the strain of the breadth and scope of the prosecution case could clearly be seen, with acquittals being entered in respect of over one thousand charges across the Croatia and Bosnia indictments.”<sup>15</sup> The ultimate effect on the Prosecution’s case is, of course, unknowable, and beside the point: As a matter of judicial process, the Decision was an opportunity to streamline a bloated trial, and the judges took it.

## IV. The Limits of International Legal Procedure

The Decision bespeaks a judicial competence that was not always in evidence in Courtroom I. It represented a judicial high point in a trial that was marred, both before and after the Decision, by a tendency for grandstanding by its parties. To a degree, of course, the judges’ were ultimately responsible for controlling the proceedings, and bear some blame for this, but in writing the Decision—away from the courtroom, in full control of their own process—the judges made a sober contribution to international procedural justice and, as a result, to the ICTY’s credibility more generally.

Still, the judges also fell short in critical respects, and we shall focus on two related shortcomings here. The first relates to the Chamber’s uncritical acceptance of the Prosecution’s theory of responsibility, notably its invocation of the doctrine of JCE. The second has to do with the judges’ hesitation to radically curtail the *Milošević* trial’s geographical scope. Together, these suggest that although the Decision successfully limited the Prosecution case’s scope in broad, numerical terms—in terms of the charges—it failed to constrain its conceptual profligacy.

**JCE:** The question of responsibility is raised most vividly by the Chamber’s perfunctory treatment of JCE doctrine—a superficial

engagement all the more surprising in light of the extensive discussion other Trial Chambers, not to mention the Appeals Chamber, have devoted to this invented mode of individual criminal responsibility. Both the majority opinion and Kwon's dissent are problematic, and two aspects in particular: the Chamber's expansive conception of the boundaries of the JCE; and its uncritical embrace of a supposed compatibility between the requirements of genocide and the lowered mens rea needed for a conviction under the so-called JCE III theory.\*

Both the literature and the jurisprudence on JCE are extensive, and contain contending positions;<sup>16</sup> JCE “still remains one of the most contentious issues in [the ICTY and ICTR's] jurisprudential life and its contours have fluctuated a great deal over the years.”<sup>17</sup> Unfortunately, the Decision acknowledges neither this doctrinal dissonance—apparent even within the ICTY's own jurisprudence<sup>18</sup>—nor the immense evidentiary challenges in delineating the nature and membership of a JCE. The mere 20 lines of text justifying the finding that the Prosecution had put forward sufficient evidence to continue the trial to determine if Milošević “was a participant in a [JCE], which included the Bosnian Serb leadership, the aim an intention of which was to destroy a part of the Bosnian Muslims as a group,”<sup>19</sup> are wholly inadequate in light of the significance of the issue. This is all the more so considering the extended length of the Decision, which runs to 330 paragraphs, not counting the separate and dissenting opinions; it is not unreasonable to expect that the Chamber could have devoted more than a single paragraph to the fledgling doctrine of JCE and its application in the *Milošević* case.

JCE remains controversial for a reason, for there are inherent risks or trade-offs in relying on JCE as a principal mode of responsibility:

Unless narrowly construed, this form of liability could come dangerously close to assigning guilt for mere membership in a group (be it a political party, the main staff of an army, the crisis staff of a region, or a ministry) and de facto place the burden upon the accused to establish that, despite its belongings to such a group or despite his association with members of that group, he did not partake in a criminal purpose that was assisted or pursued by that group.<sup>20</sup>

The potentially problematic nature of JCE is specially heightened in genocide prosecutions such as *Milošević* because of the effects JCE can have on the standards for the mental element. In a genocide case, if the

*dolus specialis* of the defendant can be directly established beyond reasonable doubt—if it is incontrovertible that he personally had the intent to commit genocide—no problem arises. However, in cases based on a JCE theory, as all the leadership cases such as *Milošević* are, the matter is more complicated: In the Decision, the Trial Chamber held it plausible that “the Accused was a participant in a [JCE]... to commit other crimes than genocide and it was reasonably foreseeable to him, that as a consequence of the commission of those crimes, genocide of a part of the Bosnian Muslims as a group would be committed by other participants in the [JCE], and it was committed.”<sup>21</sup>

This disposition is problematic because it necessarily contemplates the possibility of a genocide conviction with a mens rea requirement lower than special intent. According to the judges, it was “not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability.”<sup>22</sup> With this pronouncement, the Chamber risked watering down the *dolus specialis* of genocide at a point during the proceedings when no strong determination of this kind was called for.<sup>23</sup>

In his dissenting opinion, Judge Kwon further complicated matters. He disagreed with the majority’s finding that a reasonable trier could find that Milošević himself had the *dolus specialis* required for genocide. Yet Kwon believed that Milošević could be convicted for genocide under JCE III, which imposes liability for crimes that were a natural or foreseeable consequence of the common plan at the heart of the JCE)<sup>24</sup>—signaling that, for him, the only way Milošević could be convicted for genocide was on a theory that allowed a lowered mens rea.

It is not self-evident that the Trial Chamber, at this juncture, needed to settle conclusively if the mens rea requirement for genocide was compatible with the mens rea for JCE III, either in general or in the case at hand. Certainly, Rule 98*bis* did not require the Trial Chamber to go this far: The judges could have raised the thorny legal question of the mens rea for genocide under JCE III without actually answering it. Under Rule 98*bis*’ standard of review, all they needed to indicate was whether the Prosecution’s preferred theory was plausible enough for some hypothetical chamber to accept.



Even if they wished to engage more concretely with the Tribunal's existing jurisprudence, the judges in *Milošević* could have argued that the Prosecution's interpretation of JCE was in accordance with decisions from other Chambers that had allowed for the possibility of genocide convictions under JCE III even in the absence of evidence of *dolus specialis*. The *Milošević* judges could have given the Prosecution the benefit of the doubt—the benefit, that is, of Rule 98*bis* generous standard—while still highlighting the possibility that they eventually might find fault with the Prosecution's theory. It would have been entirely reasonable, and permissible in procedural terms, to sidestep a resolution of this most difficult of legal questions until the judgment stage.

Instead, the Chamber gave a determinate answer, and the net result of the rudimentary reasoning they employed was conceptual confusion: In evidentiary terms, “a considerable question mark was left hanging over this crucial and emotive aspect of the prosecution's case in respect of Bosnia—that Milošević had the specific intent to commit genocide in Srebrenica and elsewhere.”<sup>25</sup> Given the charged nature of this portion of the *Milošević* case—the genocide counts being probably the most controversial and potentially consequential aspect of the whole trial—the Chamber would have been better advised, in 2004, to sidestep the problem of JCE—or to engage it in a more sophisticated manner. The doctrine was still evolving and continued to baffle all Trial Chambers despite regular interventions by the Appeals Chamber intended to clarify the nature of JCE in all of its categories. The judges in *Milošević* would have been well-advised to acknowledge the potential difficulties involved in relying on JCE III to attain a genocide conviction, and therefore reserve judgment on the issue—literally and figuratively.

**Scope:** Aside from the evidentiary laxness introduced by JCE, there is the related problem of the Decision's failure to constrain the case's scope. Despite the fact that they found some one thousand allegations against Milošević unconvincing, the judges missed an opportunity to further streamline the overwrought case in coherent and systematic ways. Despite substantially pruning the Prosecution's case, the Chamber proved unwilling to reduce the scope of the trial in a more than superficial or scattershot manner. Human Rights Watch, after a comprehensive evaluation of the *Milošević* trial, persuasively argued that “crime scene evidence still could have been narrowed further” in the Decision.<sup>26</sup>



By drafting three comprehensive indictments, the Prosecution sought to make the case representative of the types of international crimes it believed had been committed, the temporal and geographical dimensions of the conflict, and the types of contributions that *Milošević* was alleged to have made to their furtherance. This was a tall order, but given *Milošević*'s centrality in the violent dissolution of Yugoslavia, it is certainly understandable why the Prosecution was itching for a master trial, so to speak. And yet it would have been possible to underscore the breadth and variety of criminality with a far more selective prosecutorial strategy—which is why the Motion to Acquit presented a unique opportunity to the Chamber.

Because the judges had not previously used their *proprio motu* authority to curb the expansive indictments, they might have invited the Prosecution to consider dropping charges, or even counts, that were not integral to the project of proving individual guilt and that would not have seriously compromised its desire for a comprehensive case. The Rule 98bis context itself would not have been appropriate for doing this, but given that the judges found that more than one thousand allegations were insufficiently supported by the Prosecution's evidence, such an intervention could have been justified procedurally. It would have been legitimate, even prudent to remind the Prosecution of the need to reconcile the conflicting imperatives of conducting a fair and expeditious trial and proving system criminality.\*<sup>27</sup>

Perhaps indirect proof of this idea that there was more room for streamlining the case is that, in the wake of *Milošević*, a number of other judges at the Tribunal embraced “a more aggressive approach in eliminating crime scenes.”<sup>28</sup> In addition to adopting, in May 2006, Rule 73bis (d) and (e)—which allowed Trial Chambers to invite the Prosecutor to reduce the number of counts charged, to select a limited number of crime scenes, and to direct the Prosecution to focus on specific counts—the ICTY Chambers as a whole became less lenient with the Prosecution as far as the empirical breadth of indictments was concerned. Indicative of this new judicial regime was the *MOS* trial, which unfolded in a far more circumscribed fashion than originally envisaged by the Prosecution in its indictment, the core of which originally had been joined with the *Milošević* indictment. More recently, the *Mladić* Chamber also slashed the indictment, reducing it from 196 to 106 charges “in the interest,” as the

judges put it, “of a fair and expeditious trial.”<sup>29</sup> Upon the invitation of the Trial Chamber, the Prosecution also limited the number of municipalities to 15, down from 23. By so doing, it drastically reduced the alleged number of crime scenes, yet the indictment, if proven, will still more than suffice to serve the goals of demonstrating individual guilt and indicating more comprehensive claims about the conflict.

## V. Re-Legitimizing the *Milošević* Trial

The Rule 98*bis* Decision may not have delivered substantive justice for international crimes perpetrated on the territory of the former Yugoslavia, but it meted out international procedural justice. It ushered in a new mode of interaction between the judges and Milošević. In the immediate aftermath of the Decision, “The mood in court had begun to change this summer, when a new judge, Iain Bonomy, replaced Richard May, who [had] died of cancer. It seemed Judge Bonomy, a no-nonsense Scottish judge, had not been worn down by Mr. Milosevic’s ways.”<sup>30</sup> Although Bonomy’s personality played an important role in the Trial Chamber’s reassertion of authority in the courtroom,<sup>\*</sup> it is reasonable to suppose that the confidence and comprehensive grasp of the case that the Chamber generally displayed in the Decision contributed to putting the parties on notice.<sup>†</sup>

Despite these positive consequences that directly or indirectly flowed from the Decision, it is likely that, had there been a final judgment in the *Milošević* trial, the 2004 Decision would now be regarded in a far more negative light, because the very idea behind it has come under attack. Judge Robinson’s separate opinion cast serious doubt on the necessity of the “no case to answer” provision in the ICTY Statute.<sup>‡</sup> Other practitioners concurred, finding that Rule 98*bis* “has no useful place in international prosecutions.”<sup>31</sup> It is ironic, therefore, that it was the existence of this useless rule that allowed the Trial Chamber to regain some of the legitimate authority that it had previously lost. The Decision re-legitimated the *Milošević* trial through international legal procedure.

Although the Decision does not substitute for judgment, it is worthy of recognition in the annals of the ICTY because it interrupted the developing

theater of international justice in the trial of the Tribunal's most infamous defendant. It usefully reminded the parties to the proceedings as well as onlookers that an international trial is not—and should not be—overly dramatic. Long before *Milošević*, international trials were criticized as “a citadel of boredom.”<sup>32</sup> Yet being boring is not the same thing as failing to do the work that international adjudication should do. By responding with great care, and for the most part in great detail, to the procedural requirements of the ICTY, the *Milošević* Chamber tied the acceptability of its findings not only to the quality of its arguments but also, and perhaps more important, to the structure of the argumentative process at the Tribunal. If we believe Habermas, this approach to international law “relies on a strong concept of procedural rationality that locates the properties constitutive of a decision's validity not only in the logicosemantic dimension of constructing argument and connecting statements but also in the pragmatic dimension of the justification process itself.”<sup>33</sup> It is in this sense that the Chamber moved beyond the theater of international justice.

By emphasizing the centrality of international law's procedure—not its politics—the Rule 98*bis* Decision repaired and redeemed some of the pathologies of the *Milošević* trial. Although no legal proceeding is able “to control the way in which it will become a cultural artifact and will pass into collective memory,”<sup>34</sup> the *Milošević* Chamber's Decision went a long way toward restoring confidence in the legitimacy of international adjudication at the ICTY.

## Can We Salvage a History of the Former Yugoslav Conflicts from the *Milošević* Trial?

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*The ICTY has amassed an enormous amount of evidence, and its judgments offer detailed reconstructions of events that are tantamount to historical narratives. Dissection of these narratives affords an opportunity to probe the nexus of law and history, a burgeoning field of scholarly inquiry. Historians shared the general sense of disappointment at the untimely end of the Milošević trial, yet in the absence of a judgment, the Tribunal's earlier Rule 98bis Decision provides the best indications of the judges' potential views. Most important, it found that the Prosecution had adduced "sufficient evidence to support each count challenged in the three indictments." This chapter subjects the Decision to the kind of methodology historians apply to final judgments in other cases to see whether one can obtain a useable "first draft" of history by attending to their interlocking narratives. Any attempt to derive historical claims from the work of the Tribunal confronts conceptual and policy obstacles. Observers have criticized the Prosecution for telling a story of the war rather than conducting an expedient trial, yet Milošević too viewed the courtroom as a theater of history and actively attempted to propound his*



*version of recent Yugoslav history and his role. An historical interpretation of the Tribunal's work is unavoidable.*

The ICTY has amassed an enormous amount of documentary and electronic evidence related to the dissolution of Yugoslavia and the conflicts that ensued. Final judgments have been rendered in over 85 cases, spanning a wide array of defendants and crime bases. These often enormous judgments offer detailed reconstructions of events that in their factual content and scope are tantamount to historical narratives. Dissection of these narratives produced in the laboratory of international criminal justice affords an opportunity to probe the nexus of law and history, a burgeoning field of scholarly inquiry.<sup>1</sup>

Regarding the *Milošević* trial, historians shared the general sense of disappointment at its untimely end. Despite the advanced stage of the proceedings, the Trial Chamber could of course issue no judgment after Milošević died. Given the importance and scope of Milošević's actions during the collapse of Yugoslavia, any attempt to write the history of this period must come to terms with his crucial contribution. Yet historians were, it seemed, deprived of the informed evaluation of his role a judgment would have offered.

However, almost two years earlier, in June 2004, the Chamber had issued an important ruling dismissing a motion for acquittal brought by the *Amici Curiae*.<sup>2</sup> As Waters discusses in his chapter, this Rule 98bis Decision provided preliminary indications of the Trial Chamber's potential final findings, and far from being perfunctory, the Decision was a lengthy and meticulous document. Most important, it found that the Prosecution had adduced "sufficient evidence to support each count challenged in the three Indictments, but there is no or insufficient evidence to support certain allegations relevant to some of the charges in the Indictments."<sup>3</sup> Milošević therefore had to defend himself on all counts.

Writing in 2003, Michael Scharf portentously pronounced that "the one thing the Tribunal wants to avoid more than anything else is having Milošević expire during the trial. His death would literally erase history from being recorded[.]"<sup>4</sup> Scharf's hyperbolic conclusion elides the enormous trove of documentation amassed by the ICTY as a result of the

proceedings against Milošević—by November 2005, several months before his death, over 1.2 million pages had been disclosed to the Defense<sup>5</sup>—as well as the Decision’s role in interpreting that documentation. True, the arguments contained in the Decision fall considerably short of providing a judicial history of the conflicts in Croatia, Bosnia, and Kosovo. Nevertheless, when analyzed in conjunction with other ICTY judgments, particularly those sections that address the role of Milošević, a reasonable first draft of his leadership role in the armed conflicts in Croatia, Bosnia and, in particular, Kosovo begins to emerge. As a recent summary of the dissolution of Yugoslavia concluded, “the historical record shows that it was Milošević and no one else whose actions pushed the country to the brink.”<sup>6</sup>

The use of the term “reasonable” is deliberate, and aligns with what the Decision itself says about the conclusions a court might reasonably draw from the evidence in the *Milošević* trial. Drawing on a previous ruling by the Appeals Chamber, the Trial Chamber noted that “the test for determining whether ‘the evidence is sufficient to sustain a conviction’ is ‘whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.’”<sup>7</sup> As Waters notes, this is “an extremely low burden [.]”<sup>\*</sup> It in effect assigns the highest probative value to the evidence led by the Prosecution, but the Trial Chamber also insists only that a conviction *could* be rendered by a tribunal of fact, not that it *will* be rendered. Given the absence of judgment in *Milošević*, this requires examination of other related cases that did reach final adjudication, in order to draw the full interpretative value from the Decision’s reading of the evidence.

This chapter begins with a brief introduction to research on the intersection of international criminal justice and history. It briefly details the methodology used to dissect ICTY judgments, and applies an abbreviated form of it to the Decision. It then combines this analysis with findings in other ICTY cases that intersect with *Milošević* to see how much history can be salvaged from the trial. Do findings in other cases tend to confirm the tentative narrative set out in the Decision, or do they indicate a different version of events and a different role for Milošević? It is important to stress that this is not an exercise in guessing whether the Trial Chamber would have found Milošević guilty; this chapter cannot

avoid implicitly addressing that question, but the focus is on the trial's legacy for the historiography of the Yugoslav conflicts.

Underlying this inquiry is the question of whether an international criminal courtroom is an appropriate place for writing history. Internal and external critics of the Prosecution's decision to try Milošević simultaneously on three different and expansive indictments have disparaged the Prosecution for wanting to tell a story rather than conduct a fair and expedient trial.<sup>8</sup> At the same time of course, Milošević himself, while ostensibly dismissing the Tribunal as a travesty and a farce, implicitly cooperated in the conduct of the proceedings; notwithstanding allegations of obstructionism, he certainly viewed the courtroom as a theater of history and actively attempted to use it to propound his version of recent Yugoslav history and his role in it, rather than narrowly defend himself against the Prosecution's charges.\* So both the Prosecution and Milošević tacitly used (or abused) the ICTY for this purpose during the *Milošević* trial: As Boas has shown elsewhere, the Trial and Appeals Chambers were complicit with both of them, allowing the Prosecution's request for a joinder of three separate indictments, and refusing to set tougher limits on the behavior of the Accused.<sup>9</sup> This made *Milošević* into perhaps the biggest test since Nuremberg of whether history could be written through a trial. In order to understand how this occurred, it is necessary to situate the trial in the context of the ongoing debate about the place of history in the courtroom.

## **I. International Criminal Justice and History: New Research Directions**

There is a growing field of scholarly inquiry that examines the way in which international criminal courts produce and interact with history. Such interaction occurs in at least four ways. First, as institutions that investigate, indict, and prosecute prominent military and civilian leadership figures, courts themselves become historical actors that are "very much aware of their historical importance."<sup>10</sup> Second, the very act of investigating and prosecuting necessitates the accumulation of vast quantities of documentation, which transforms these institutions into



repositories—archives—for some of the most salient documentation related to major historical events.<sup>11</sup> Third, the prosecution of alleged war criminals puts these documents on public display, along with witnesses, particularly victims and insiders—whose testimony in court produces a sort of oral history—which increases public knowledge and understanding of the conflict.\* Finally, in passing judgement, courts usually provide a well-reasoned verdict assessing the legal responsibility of the accused for the commission of crimes. In doing so, they are inevitably assessing at least part of the history of the conflict, and issuing rulings that help define the nature of the crimes committed and the identities of the victims and the perpetrators.

When examining the intersection of international criminal justice and history, three schools of thought can be discerned. First, there are those who feel that international criminal justice should focus as narrowly as possible on ascertaining the level of criminal responsibility, both during the investigative and trial phases of the case. This view, which can be grounded in legal, financial, and philosophical arguments, favors the minimalistic and purely utilitarian collection of evidence, combined with short, sharply focused trials. In the aftermath of the *Milošević* trial, this view has become more prevalent, as one can see a general backlash in the ICL community against what was perceived to be a bloated trial.<sup>12</sup> Thus, the ICC has to date attempted with limited success to avoid sweeping indictments that would necessitate long trials and detailed historical contextualization<sup>†</sup>—a view commonly thought to have been informed in part by the experience of *Milošević*.

In the middle, a second school holds that history cannot be excluded from investigation or the courtroom, not least because judges must understand the historical context of the crimes. This view recognizes that war crimes are generally committed as part of larger political and military programs: a concentration camp is not a simple case of assault, or even a typical homicide case in a domestic jurisdiction. This point was made by Justice Jackson about Nuremberg's unprecedented sweep: "Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a third of a continent and involving a score of nations, countless individuals, and innumerable events."<sup>13</sup> The totality, magnitude, and sheer scope of the crimes



committed lead to what has been called the “exponential character” of war crimes, in which a “terrible reality cannot be explained simply as a composite of individual crimes committed for individual reasons.”<sup>14</sup>

Finally, a third school holds that international criminal trials will produce definitive histories of conflicts. This view can be traced to the claims of some participants in the Nuremberg Trial. Thus Robert Kempner, a junior U.S. prosecutor, referred to the International Military Tribunal as “the greatest history seminar ever held in the history of the world[,]” and Sir Hartley Shawcross, the chief British prosecutor, held Nuremberg to be an “authoritative and impartial record to which future historians may turn for truth.”<sup>\*</sup> This school has perhaps become somewhat less common among academic observers in the last decade, though versions of it persist.

Clearly, representatives of the formerly warring parties in Croatia, Bosnia, Serbia, and Kosovo continue to dispute and on occasion reject the factual findings of the Tribunal,<sup>†</sup> and recent cases in which Holocaust deniers have been prosecuted have evinced the difficulty of enforcing “judicial undeniability.”<sup>15</sup> Even within the ICL mainstream, however, claims appear that courts produce an authoritative record or establish undeniable facts that in turn can be deployed to combat denial, and courts themselves continue to evince an attraction to this expansive interpretation of their role. Richard Goldstone, the first chief prosecutor of the ICTY, once stated that the Tribunal aimed to “create an internationally public record of what has occurred in the former Yugoslavia.”<sup>16</sup> The ICTY has trumpeted its creation of an “indisputable historical record[,]”<sup>‡</sup> and the ICTR has claimed that the work of that institution has not only provided proof of the commission of genocide in Rwanda, but by “unanimously and decisively confirm[ing] the occurrence of genocide in Rwanda ... the fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a ‘fact of common knowledge.’”<sup>§</sup>

In her opening statement in *Milošević*, Chief Prosecutor Del Ponte presented her own historical ambitions. Del Ponte echoed Justice Jackson in remarking that “I recognize that this trial will make history, and we would do well to approach our task in the light of history.”<sup>17</sup> She went on to state that “the history of the disintegration of the former Yugoslavia and the fratricidal conflicts of another age which it brought about is a complex

process which must be written by many people. This Tribunal will write only one chapter, the most bloody one [.]”<sup>18</sup> She then handed off to Prosecutor Geoffrey Nice, who elaborated on Del Ponte’s theme in a way that showed how all three of these schools’ understandings of how history and courts interact can be represented in a single trial:

This trial, as, again, the Prosecutor has correctly explained, will not be making findings as to history. Matters of history always leave scope for argument, for doubt between historians. But history, even distant history sometimes available to this Court through the witnesses, will have a relevance from time to time in showing what the accused thought, what those identified in indictments as his co-perpetrators thought, what his compliant supporters thought, and what was available in history to fire up the emotions, particularly nationalist emotions, however little this particular accused might personally and genuinely have held those nationalist views.<sup>19</sup>

It is important to distinguish, however, between the *use* and the *production* of history in the courtroom.\* As Nice’s statement shows, both occurred in *Milošević*. Although the protracted course of *Milošević* illustrates that it can be difficult to untangle the two, the present study concentrates on the production of history. A public record is not the same as a history, but certainly provides a substantial part of the raw material for the writing of history.

We can assess the production of history in the *Milošević* courtroom through a very simple methodology that parses ICTY trial judgments until they are reduced to a collection of positivistic “historical facts.” These statements satisfy the following questions:

1. Does the statement purport to establish that an action, event, or process did or did not occur at a particular moment or over a given period of time?
2. Does the statement represent the trial chamber’s final decision on that particular matter?

Using these questions, the judgment is stripped of its jurisprudence and legal considerations. What remains has been memorably described in the introduction to *Justiz und NS-Verbrechen*, the mammoth officially published volumes of judgments on Nazi war crimes, as “*die durch die*

*Strafverfahren zutage geförderten historischen Erkenntnisse*” (the historical findings brought to light through criminal proceedings).<sup>20</sup>

In the absence of a judgment in *Milošević*, the Rule 98bis Decision can be used, supplemented by a comparison with relevant facts garnered from judgments in other cases where conclusions were rendered on the role of Milošević. This permits cautious and tentative conclusions about the accuracy of the facts in the Decision. Moreover, we are not limited to the Decision: Facts relevant to *Milošević* can also be extracted from judgments in other cases that do represent the end products of full trials; these can then be compared with the Decision’s factual account. None of this surmounts the heuristic difficulties or imperfections of the Decision that concern Waters—only a completed trial could have done that. But it is the methodological conceit of this article that the judgments of other relevant cases at the Tribunal can be used as a tentative check on the Decision and its very low fact-finding threshold.

At the same time, while engaging in the kind of salvage exercise proposed by the title of this chapter, we cannot lose sight of the very different methods and goals of the historian and the courtroom judge or lawyer. Often the historian and the lawyer will agree on a fact—for example the death of a person—but the lawyer and the court aim to achieve a legal characterization of this fact. Was it a natural death, a homicide, or perhaps a killing conducted with genocidal intent? Historians are, of course, also interested in classifying events—witness the often polemical debates about whether various mass killings in earlier history qualify as genocide or not—but unlike lawyers, they are not bound to view facts through a legal filter. For precisely these reasons, the Nuremberg Trials resulted in “tortured” history.<sup>21</sup> As Lawrence Douglas writes, “[a]t times, the legal lens through which evidence of atrocity was filtered resulted in substantial distortions of the historical record. More often, the legal structure fashioned at Nuremberg failed in a more complex fashion to represent and make sense of traumatic history.”<sup>22</sup> As we will see, some of the same problems remained decades later during the *Milošević* trial.



## II. The Rule 98bis Decision on the Motion for Judgment of Acquittal\*

The Motion for Judgment of Acquittal that the Trial Chamber considered and ultimately rejected was filed not by Slobodan Milošević; consistent with his refusal to recognize the Tribunal's legitimacy, he did not make a motion to dismiss the Prosecution case. So, on 3 March 2004, pursuant to Rule 98bis, the *Amici* filed a motion asking the Trial Chamber to acquit on all counts.<sup>23</sup> According to the Trial Chamber's summary of the motion, the *Amici* argued, inter alia, that "there is no evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a genocide, any genocidal acts, or that he was complicit in such."<sup>24</sup> The *Amici* also asserted that the Prosecution had failed to show the existence of an armed conflict in Kosovo or to prove that the conflict in Croatia was of an international character<sup>25</sup>—claims which, if upheld, would have required several counts to be dropped for lack of jurisdiction.

The Chamber issued its Decision in June. At 146 pages, the Decision was considerably longer than previous Rule 98bis decisions by other trial chambers. According to Boas, in his book on the trial

the reason for such an extensive judgment in *Milošević* probably lay in the fact that there were a large number of "crime base" allegations in the Croatia and—particularly—Bosnia indictments for which acquittals were entered. There were important legal questions raised concerning the existence of an armed conflict in Kosovo, the legal tests for deportation and forcible transfer and the existence of Statehood for Croatia, which impacted on the internationality of the armed conflict and therefore the application of grave breaches of the Geneva Conventions to crimes charged against Milošević in the Croatia indictment.<sup>26</sup>

Although dismissing numerous individual allegations cited in the indictment due to lack of evidence, the Chamber did not remove any count from the indictment.

A distinction must be drawn between the Chamber's findings in its Decision and the hypothetical findings the same Chamber would have issued had the case been brought to final judgment.\* Relying on a ruling by the Appeals Chamber in *Jelisić*, the judges in *Milošević* note that their findings conform to a test as to "whether there is evidence (if accepted)



upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question...; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether it could.”<sup>27</sup> It is certainly possible that a chamber could deny a Rule 98*bis* motion and then subsequently acquit; this occurred in *Krajišnik* on the genocide count, for example.<sup>28</sup> This proves, as the Trial Chamber in *Milošević* observes, that the denial of a rule 98*bis* motion signifies that the Chamber *could* convict, not that it *will* convict. This legal test can be confusing and has provoked criticism.<sup>†</sup>

The Trial Chamber’s reasoning in the Decision is based on a review of the evidence led by the Prosecution. Logically, it should also factor in points made successfully by Milošević on cross-examination or by the *Amici* during the Prosecution phase. The Decision does not appear to do this, in that it takes Prosecution evidence as its highest probative value and assumes its credibility; however, as noted by Human Rights Watch, “the fact that Milošević had the opportunity to test the prosecutor’s evidence in cross-examination enhances its value as a historical record.”<sup>29</sup>

The substantive portion of the Decision examines the challenges to the three indictments in the order that evidence was led at trial. This section briefly reviews the major challenges to those indictments raised in the *Amici*’s Motion and the findings of the Trial Chamber in its Decision. (It does not review portions of the Decision that examine and dismiss individual alleged criminal incidents in the indictments.)

## **A. The decision on the *Kosovo* indictment**

Beginning with the *Kosovo* indictment, the Chamber scrutinized the *Amici*’s claim that there was no armed conflict in Kosovo before 24 March 1999, the date when NATO began bombing the FRY.

The *Amici* argued that the KLA was not sufficiently organized to have constituted an armed group in the sense required to claim the existence of an armed conflict.<sup>30</sup> This is an important question for determining the jurisdiction of the Tribunal, as without an armed conflict some of the Tribunal’s heads of jurisdiction, such as war crimes, could not be invoked, and counts associated with them would have to be dropped.<sup>31</sup> The *Amici*’s

claim was consistent with Milošević's assertion that the KLA was not an armed group in the legal sense, but rather a group of terrorists or bandits not entitled to the same protection under international law.\* By contrast, the Trial Chamber found that there was a "sufficient body of evidence pointing to the KLA being an organized military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms."<sup>32</sup> The judges also found that the fighting between the KLA and Serbian forces was of sufficient intensity to meet the standard for an armed conflict—and indicated that not only was the evidence sufficient to allow a reasonable court to convict, but that they themselves found some of the evidence persuasive: "Much of the evidence cited by the *Amici Curiae*, in the Trial Chamber's view, actually substantiates the case for the Prosecution that there was an armed conflict during the relevant times."<sup>33</sup> In stating this, the Trial Chamber arguably went well beyond the ambit of the legal exercise prescribed in Rule 98*bis*, but that does not affect its value as an indication of how the judges viewed the evidence: The Chamber dismissed the challenge to the *Kosovo* indictment, preserving all counts.<sup>34</sup>

## **B. The decision on the *Croatia* indictment**

The main challenge by the *Amici* to the *Croatia* indictment focused on the question of when Croatia became a state and the consequent existence of an *international* armed conflict for the period of the crimes alleged—again, a threshold question for invoking parts of the Tribunal's jurisdiction.<sup>35</sup> Whereas the Prosecution asserted that Croatia had been independent since 8 October 1991, the *Amici* argued that Croatia had become a state no earlier than 15 January 1992, and possibly as late as 22 May 1992.<sup>36</sup>

In examining this challenge to the *Croatia* indictment, the Trial Chamber reviewed the relevant international legal jurisprudence and referred to the work of the Badinter Commission, the body appointed by the European Communities that attempted to arbitrate the breakup of Yugoslavia. The Trial Chamber broke down customary definitions of international statehood into constituent parts and examined whether Croatia fulfilled these criteria, and "conclude[d] that there is sufficient

evidence that Croatia was a state by 8 October 1991 for the purposes of Rule 98bis[.]”<sup>37</sup>

From the point of view of history, the parts of the Decision dealing with Kosovo and Croatia speak in detail only to the larger questions of whether (international) armed conflict existed. Little or no information is provided on the role of Milošević. At the level of the crime base, readers of the Decision encounter only an opaque list of alleged crime scenes in which the Trial Chamber finds that enough evidence has been adduced about the commission of crimes to warrant an answer from the defense.

### **C. The decision on the *Bosnia* indictment**

In challenging the *Bosnia* indictment, the *Amici* disputed the charges of genocide and complicity in genocide. This was the most explosive and heavily debated charge in the three indictments. As coverage of the *Milošević* trial dominated the media’s coverage of the ICTY, so the charge of genocide dominated the public and victim communities’ understanding of the trial, and through it, of the Tribunal as a whole. Unfortunately, this has resulted in an extremely defective understanding of the Tribunal’s work. Such a perspective devalues all convictions on charges other than genocide, by suggesting that the Prosecution (and, by implication, the Tribunal) must achieve a conviction on genocide in order to “succeed.”\* Inherent in the criticism was also the erroneous notion that if Milošević were not convicted for genocide in Bosnia, no one else would be. Yet, since *Milošević*, there have been convictions for genocide at Srebrenica, and the Tribunal’s rulings and documentation tend rather to suggest that Milošević and the leadership of Serbia, although content to fund the Bosnian Serbs’ war effort and defend them against international criticism, did not share the genocidal intent of some Bosnian Serb actors.<sup>†</sup>

In its case, the Prosecution had attempted to show that “the Accused participated in a joint criminal enterprise, the objective of which was the destruction of the Bosnian Muslim group in that part of the territory of Bosnia and Herzegovina intended to be included in the Serbian state.”<sup>38</sup> By contrast, the *Amici* argued that the Prosecution had not led any evidence demonstrating a connection between Milošević and the alleged crimes, and that Milošević did not possess the *dolus specialis* for genocide because he had not done or said anything that “could be interpreted as



declarations of an intention to commit genocide.”<sup>39</sup> In addition to a number of other legal points, the *Amici* also disputed whether genocide had, in fact, occurred during the conflict in Bosnia.<sup>40</sup>

The Trial Chamber reviewed the Prosecution’s evidence on genocide in eight Bosnian municipalities (Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varoš, Ključ, and Bosanski Novi).<sup>‡</sup> The Chamber then considered whether Milošević intended to commit genocide, and whether he participated in a genocidal JCE. Finally, the Chamber also considered several questions that related to the connection between genocide charges and Milošević’s mental state, asking whether Milošević (1) even if lacking *dolus specialis*, could still have reasonably foreseen that the other criminal acts in which the JCE was engaged could have escalated to a genocidal level; (2) aided or abetted genocidal acts; or (3) knew or had reason to know that his subordinates were about to commit genocide, or had committed genocide, and failed to punish them.<sup>41</sup>

After proceeding through the eight municipalities and reviewing the evidence, “a Trial Chamber could be satisfied beyond a reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosniak population, and that genocide was in fact committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ, and Bosanski Novi.”<sup>42</sup> No evidence of genocide was found in Kotor Varoš.<sup>43</sup>

Having established the possibility that a reasonable trial chamber could find the existence of a JCE with the intent of committing genocide, the Chamber assessed Milošević’s role in the JCE and whether he shared the intent of the other participants. The judges first examined evidence suggesting that Milošević was the “leader of all Serbs[,]” consisting of statements by other Serb leaders such as Milan Babić of the RSK and by foreign diplomats who had met and negotiated with Milošević, as well as Milošević’s own statements about the Serbian nation.<sup>44</sup> The judges then studied the relationship of Milošević with the military and civilian authorities of the Bosnian Serbs, finding it reasonably plausible that he held “profound influence” over them.<sup>45</sup> More precisely, the Trial Chamber pointed to Prosecution evidence of connections between the VRS and the VJ, including the existence of the 30th Personnel Center, which had served as a cover for the VJ’s continued funding of the VRS and the payment of



its officers' salaries.<sup>46</sup> In sum, the Decision found it reasonably plausible that "the salaries and pensions of VRS members came from Belgrade; the JNA provided the VRS continual support in terms of equipment, ammunition, and manpower and occasionally participated in armed operations during the war."<sup>47</sup>

The Decision portrayed Milošević as being consistently well-informed about the military and political situation in Bosnia: It cited evidence suggesting that Milošević not only kept abreast of the situation but was consulted by the Bosnian Serb military and political leadership, and that his counsel was taken by them as being authoritative.<sup>48</sup> Some evidence was noted that alluded to Milošević's possible advance knowledge of the intentions of General Ratko Mladić regarding the civilian population of the Srebrenica enclave in July 1995.<sup>49</sup> Finally, Milošević's extensive involvement in the negotiations leading to the Dayton Accords—including his exercise of authority on behalf of the Bosnian Serbs, his ability to accept provisions which the Bosnian Serbs themselves regarded as unacceptable and to impose such conditions on them—was taken as reasonably plausible evidence of his superior leadership role vis-à-vis the Bosnian Serbs.<sup>50</sup>

The Chamber therefore concluded that "a Trial Chamber could be satisfied beyond reasonable doubt that the Accused was a participant in the joint criminal enterprise, found by the Trial Chamber ... to include the Bosnian Serb leadership, and that he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group, Judge Kwon dissenting."<sup>\*</sup> Further, "a Trial Chamber could infer that he not only knew of the genocidal plan of the joint criminal enterprise, but also that he shared with its members the intent to destroy a part of the Bosnian Muslims as a group in that part of the territory of Bosnia and Herzegovina which it was planned to include in the Serbian state"<sup>51</sup>—that is, that Milošević may have had the special intent required to sustain a conviction for genocide.<sup>†</sup> Nevertheless, Judge Kwon's dissenting opinion meant that "a considerable question mark was left hanging over this crucial and emotive aspect of the prosecution's case in respect of Bosnia."<sup>52</sup>

Given that the Prosecution had proffered little or no evidence showing that Milošević personally ordered genocide, the Chamber considered whether Milošević should have foreseen that the criminal conduct of the

JCE of which he was allegedly a member would reasonably lead to genocide, and thus he could be held responsible for acts of genocide committed by others. The *Amici* argued that the particular mens rea required for genocide was incompatible with the notion of a JCE,<sup>53</sup> because although a JCE by its nature imputes responsibility for acts by one individual to another, genocide requires one to specially intend the destruction of a group, not merely be aware of it. Citing the Appeals Chambers in *Tadić* and *Brđanin*, the Trial Chamber argued that one of the three categories of JCE allowed for individual criminal liability in cases in which “the crime charged was a natural and foreseeable consequence of the execution of that enterprise and that the Accused was aware that such crime was a possible consequence of the execution and that, with that awareness, he participated in that enterprise.”<sup>54</sup> In their reasoning, Judges May and Robinson came very close to establishing an authoritative legal test, as opposed to merely conjecturing what a reasonable trial chamber could plausibly conclude. This interpretation of criminal liability, as well as the entire notion of JCE, is hotly debated in legal academic circles and among practitioners.<sup>‡</sup>

In sum, the Chamber’s Rule 98*bis* Decision found that Milošević had a case to answer on all three indictments, and all counts. From the perspective of establishing a historical record, this did not necessarily amount to very much at all, given the extraordinarily low burden of proof, but this is not our only source: The next section will examine the conclusions in final judgments from other trials that dealt with evidence related to the role of Milošević. Did these judgments tend to confirm the provisional conclusions of the Decision?

### **III. Milošević in Other ICTY Judgments**

Milošević naturally figured prominently in other cases owing to the broad de jure and de facto powers he exercised during the conflicts in the former Yugoslavia, and to the Prosecution’s extensive reliance on the theory of JCE. In his own trial, Milošević was identified as a member of a vast JCE that included a large number of separately indicted individuals: Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, and Vlatko Stojiljković

for the *Kosovo* indictment;\* Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Ratko Mladić, Jovica Stanišić, Franko Simatović, and Vojislav Šešelj for the *Bosnia* indictment; and Milan Babić, Milan Martić, and Goran Hadžić, as well as Simatović, Stanišić, and Šešelj again, for the *Croatia* indictment. These individuals were tried separately under JCE theories that in turn included similar subsets of Milošević's JCE. In Krajišnik's trial, for example, the Prosecution alleged that he was "a co-perpetrator or aider and abettor, in a joint criminal enterprise" that included Milošević and most of the other prominent figures included in the Bosnian portion of his alleged JCE.<sup>55</sup> As a result, other trial chambers indirectly examined Milošević's role and his criminal responsibility.

One must exercise caution in deriving claims about Milošević's role from the judgments in other cases. Logically, other defendants had incentives to shift blame onto Milošević in order to limit their own liability, and this would have affected the strategies they adopted and the narratives they advanced; the Prosecution, likewise, might have had incentives to incorporate Milošević into the narrative of other trials after his death, precisely as a way of creating a record once it became clear there would be no final judgment in his case. At the same time, judges in other cases decided after Milošević's death might have been reluctant to reach overly definitive conclusions about his role, as they were primarily concerned with issuing findings about other defendants—a reticence that would not have affected the *Milošević* Chamber itself. More generally, the fact that these claims derive from separate cases heard by different judges means we cannot exclude the possibility of irreducible contradictions in the factual findings of different trials at the ICTY. Nevertheless, it is worth taking a look at the factual findings in other ICTY cases, as this allows us to develop a basis of comparison to the tentative, interim account in the Decision in order to gauge its value as an historical interpretation.

### **A. *Tadić***

Already in the very first case tried at the ICTY, the figure of Milošević appeared fleetingly on the stage, even though the accused, Duško Tadić, was a mere pawn in the overall conflict. In appraising briefly the findings in *Tadić* concerning Milošević, it must be observed that, much more than subsequent ICTY cases, the *Tadić* Trial Chamber indulged in sweeping



findings of fact that significantly exceeded the scope of the case.\* This arguably stemmed in part from the prevalent skepticism at the time that the ICTY would be able to apprehend and try higher-ranking officials.<sup>56</sup>

The *Tadić* Trial Chamber possessed very little of the considerable information that the Tribunal would eventually gather demonstrating political and military linkages between Milošević and the Bosnian Serbs; therefore, the *Tadić* judgment dealt with Milošević primarily in his role as an ideological and political inspiration. This arguably had distortive consequences for the Prosecution's subsequent investigative and prosecutorial strategy. The judgment found that "Milošević used nationalism to project himself charismatically as the protector and patron of Serbs throughout the former Yugoslavia"<sup>57</sup> and that he used his political power to establish "a very effective control of the media," which "was very effectively directed towards stirring up Serb nationalist feelings and converting an apparently friendly atmosphere as between Muslims, Croats and Serbs in Bosnia and Herzegovina into one of fear, distrust and mutual hostility."<sup>58</sup> The judgment noted the identification of the Bosnian Serbs' *Srpska demokratska stranka* (Serbian Democratic Party or SDS) with Milošević's policies.<sup>59</sup> As for the accused, Tadić, the judgment noted that he had personally identified himself so strongly with Milošević that he wanted to name his child after the Serbian leader.<sup>60</sup>

The mention of a policy of "Greater Serbia" and its attribution to Milošević is perhaps the most important aspect of *Tadić* for our purposes. The *Tadić* judgment concluded that the "practice of ethnic cleansing was adopted" as part of a policy of "achieving a Greater Serbia. This concept was espoused by Slobodan Milošević, with ethnic Serbs widely adopting it throughout the former Yugoslavia."<sup>61</sup> As Boas discusses in his chapter, it was precisely the alleged existence and implementation of this policy in Croatia, Bosnia, and Kosovo that led the Prosecution to argue that the three indictments should be joined into one.<sup>†</sup> This fateful decision, and the Trial Chamber's acceptance of it, came to be seen by critics as one of the major mistakes of the *Milošević* proceedings.<sup>‡</sup> Moreover, the Prosecution's use of Greater Serbia—and hence various trial chambers' understanding of the concept—was far from rigorous or consistent, notwithstanding—some argue because of—expert witnesses who testified at the ICTY about this ideology.<sup>§</sup>



## **B. *Krajišnik***

*Tadić* was in some respects a naïve case tried during the infancy of the Tribunal. By contrast, the *Krajišnik* judgment appeared when the Tribunal had reached a stage of considerably increased maturity in its operations and its understanding of the conflict in Bosnia. Significantly, though, *Krajišnik* generally reiterated the broad findings about Milošević found in *Tadić*. The relatively few mentions of Milošević focused on ideological agreement between him and the Bosnian Serb leadership, rather than forensic assessments of his command and control or actual knowledge of crimes.<sup>62</sup> This kind of cross-fertilization of cases, rather than adding to the historical knowledge about Milošević, instead featured internal replication of information from the *Tadić* judgment.

Certainly the most significant element of *Krajišnik*, when examined next to the *Milošević* Decision, is the acquittal of Krajišnik, the president of the Assembly of RS and a member of its Presidency, on the count of genocide. Indeed, a number of other major cases against Bosnian Serbs accused of genocide in 1992, such as *Brđanin* and *Stakić*, have returned acquittals on genocide. Only in June 2010, in *Popović et al.*, did the Tribunal issue a conviction for genocide, in a judgment that made little mention of Serbia's role; until then, there had been only a single conviction for complicity in genocide in *Krstić*. This would point to a tentative conclusion that genocide was not committed in Bosnia except at Srebrenica in 1995. As a corollary, it might reasonably be expected that the *Milošević* Chamber, notwithstanding its prima facie findings of genocide in a number of municipalities, would not have reached a genocide conviction for the period of 1992 in Bosnia. Indeed, by restricting the scope of the genocidal JCE at Srebrenica to a small group of VRS officers, the *Popović* judgment comes close to shutting the door to a genocide conviction for any actors from the FRY or Serbia even for the events at Srebrenica in July 1995—a turn Hartmann ascribes to a more general shift in the Prosecution's strategy.\*

## **C. *Babić* and *Martić***

Turning to Croatia, the two major cases besides *Milošević* tried at the ICTY are those of the Croatian Serb leaders Milan Babić and Milan Martić. Babić, who pled guilty, painted a portrait of extensive engagement

and interference by Milošević in the breakaway RSK. Babić admitted that he and other Croatian Serbs sought help from Milošević, the authorities of Serbia, and the JNA, but also claimed that the end result was the establishment of a “parallel structure” that to some extent led back to Milošević.<sup>63</sup> The *Babić* Chamber, again echoing the judgment in *Tadić*, stated that the Serbian media manipulated events in Croatia, and that Milošević “produced” events.<sup>64</sup>

Viewed as sources, ICTY judgments based on plea bargains are significantly less useful to historians than are judgments from cases in which a full trial is held. Judgments emerging from plea bargains are comparatively shorter and contain much less specific detail and reasoning than do those in which both prosecution and defense have presented their full cases. It is instructive, for example, to compare the 35 pages of the *Babić* sentencing judgment to the 200 pages in *Martić*. In addition, the Prosecution has incentives to convert a lower-level accused into a witness against a higher-level accused. As this involves some reduction of charges or punishment in exchange for a particular set of admissions that are strategically useful to the Prosecution, there is the risk of moral hazard infecting the truth value of the admission.

The *Martić* judgment, based on a trial judgment rather than a plea (though relying also on Babić’s testimony), includes more detailed information about Milošević’s role, including his opposition after 1991 to a political merger of the Croatian Serbs’ political entity with Serbia, seemingly in contravention of the Greater Serbia thesis:<sup>65</sup>

However, Slobodan Milošević covertly intended the creation of a Serb state. Milan Babić testified that Slobodan Milošević intended the creation of such a Serb state through the establishment of paramilitary forces and the provocation of incidents in order to allow for JNA intervention, initially with the aim to separate the warring parties but subsequently in order to secure territories envisaged to be part of a future Serb state. In Milan Babić’s view, Slobodan Milošević advocated this political objective from the summer of 1990 until the end of 1991.<sup>66</sup>

Milošević’s ability to espouse and then oppose the unification of territories under Croatian Serb (and Bosnian Serb) control tend to paint a portrait of a ruthless political opportunist rather than a passionate adherent of a Greater Serbia. Regardless of what it says about the accuracy of the Prosecution’s Greater Serbia theory as a description of Milošević’s

policies over time, the judgment confirms Milošević's ability to intervene in the political and military affairs of the RSK.<sup>67</sup> In addition to finding that the JNA and VJ supported the SVK in Croatia, the judgment also noted that the Serbian *Služba državne bezbednosti* (State Security Service or SDB) operated in the RSK independently of the RSK authorities and that Serbia provided material assistance to the armed forces of the RSK.<sup>68</sup> Perhaps most intriguingly, the judgment found that Martić had indicated in advance to Milošević that rockets might be used to attack Zagreb.<sup>69</sup> As late as January 1994, Martić referred to Milošević as "our Serbian leader."<sup>70</sup> As such, the *Martić* judgment provided a number of factual conclusions that permit some of the gaps left open by the *Milošević* trial to be plugged.

### ***C. Perišić***

Momčilo Perišić served as the Chief of the General Staff of the VJ from 1993 to 1998 and was indicted for crimes in both Bosnia and Croatia. Even though Perišić was not mentioned as a member of the JCE in the *Milošević* indictments, the *Perišić* trial judgment included a number of direct references to the role of Milošević—findings that remain valuable as historical data notwithstanding the Appeals Chamber's subsequent acquittal of Perišić on all counts. For example, it notes that Milošević was completely aware of the establishment of phantom personnel centers that permitted the VJ to finance the SVK and the VRS. Perišić had prepared this proposal and presented it to Milošević in October 1993, noting that "we have paved the way for the President of the state, in his capacity as Supreme Commander, to issue an order regulating their status and that of officers here."<sup>71</sup> Milošević knew precisely how sensitive this order would be and "stressed that only a single copy of the proposal [and of the later order] should stay with Perišić."<sup>72</sup> The establishment of the personnel centers was critical to the financing and functioning of the Croatian Serb and Bosnian Serb armies.

The *Perišić* trial judgment also revealed that the political and military leaderships of the FRY, the RS, and the RSK all met in Belgrade in November 1993 in order to draft "a single war plan."<sup>73</sup> This so-called "Drina Plan," finalized on 14 November, constituted perhaps the most



direct documentary evidence of Greater Serbia ever introduced at the ICTY, as it “provided for the creation of a single Serbian State.”<sup>74</sup> The *Perišić* Trial Chamber considered both the lack of evidence that this particular aspect of the Drina Plan was implemented and other evidence that “Milošević distanced himself from the idea of a single Serbian state.”<sup>75</sup> Weighing all the evidence presented on the Plan, the Trial Chamber concluded that

regardless of the true nature of the Drina Plan, the evidence shows that Perišić participated in the preparation and approval of this plan together with other military and political leaders of the FRY, RS and SVK. The Trial Chamber is also satisfied that while the plan was not implemented in the VJ, some actions were taken at the Main Staff level in the VRS and SVK, and to some degree at the VRS Corps level, to implement it.<sup>76</sup>

Perišić was shown to have acted on Milošević’s behalf in pressuring the Bosnian Serbs in 1994 and 1995 to accept internationally mediated peace plans.<sup>77</sup> On numerous occasions, Perišić and Milošević attended meetings together with top SVK and VRS officers, as well as with RSK and RS civilian leaders.<sup>78</sup> Both Perišić and Milošević were shown to have received regular communications about the evolving situation in Croatia and Bosnia, and Perišić and Milošević “very often” discussed the UN safe areas established in Bosnia.<sup>79</sup> Soon after the fall of Srebrenica in July 1995, Milošević asked Perišić about his knowledge of the killings there; the Trial Chamber found that, despite knowing of the crimes, neither Milošević nor Perišić took steps to cut assistance to the VRS.<sup>80</sup> However, when Bosnian Muslims fled into Serbia after the subsequent fall of the Žepa enclave, Perišić asked Milošević to stop the Serbian MUP, whose members allegedly planned to kill the refugees.<sup>81</sup> The Trial Chamber also received evidence that, on 24 July 1995, Perišić met with Mladić and Milošević, and that Milošević then lamented that “Srebrenica and Žepa have damaged us very greatly[.]”<sup>82</sup> Finally, the Trial Chamber found that Perišić and Milošević had on several occasions discussed specific combat operations in Croatia and what should be done about them.<sup>83</sup> Milošević regarded Perišić as a person who had authority over the SVK and through whom orders could be issued.<sup>84</sup> Overall, the *Perišić* trial judgment cast significant light on the role of Milošević in the Croatian and Bosnian wars.



Milošević was shown to have participated in crucial decisions that ensured that the SVK and VRS could continue to function with the financial and material support of the VJ and the FRY. This support continued long after there could no longer be the slightest doubt that these armies were committing war crimes and crimes against humanity. Although Milošević was only the President of Serbia during the wars in Croatia and Bosnia, and therefore had no de jure authority over the VJ, the most significant decisions were taken at his behest, and not that of FRY President Zoran Lilić (or, earlier, Dobrica Ćosić). The *Perišić* judgment did not pronounce definitively on the structure of the FRY's civilian leadership, but leaves a clear impression of a state controlled by Milošević, with Lilić signing whatever documents required his de jure approval.

In February 2013, the Appeals Chamber overturned *Perišić*' conviction on all counts. No legal authority attaches to the evidence and testimony from the original trial—the point which, for Waters, appears decisive—but the factual quality of many of the points established there can be judged independently of the Appeals Chambers' formal ruling. The Chamber did not find sufficient evidence of guilt, but this does not mean it rejected the truth of the many individual details and documents from which a compelling history can be constructed. Nor, indeed, is the historian constrained by the judges' view of the individual facts in any case; the *Perišić* trial record stands on its own, just as that of *Milošević* does, and the two may usefully be read together.

## **D. The *MOS* Trial and *Đorđević***

The amount of information about Milošević that can be harvested from other ICTY judgments pertaining to Croatia and Bosnia is, generally speaking, quite modest. By far the best indications of Milošević's role can be drawn from the trial judgment in the case of *Milutinović, Šainović, Ojdanić, Pavković, Lazarević, & Lukić*—popularly abbreviated as the “*MOS* Trial.” Of all cases at the ICTY, *MOS* exhibits the highest level of synergy with the *Milošević* trial. This is natural, given that several of the accused in *MOS* were originally indicted together with Milošević in 1999\* and that the *MOS* Trial Chamber relied in part upon testimony and evidence given in *Milošević*.†

The *MOS* Trial Chamber issued its judgment in February 2009, nearly three years after Milošević's death. Notwithstanding the acquittal of Milan Milutinović, the former president of Serbia, the guilty verdicts against the other accused were collectively perceived in Serbia as a belated judgment against Milošević and the Serbian state. The Serbian press took particular note of the Chamber's finding of a concerted plan in Kosovo, the execution of which involved criminal acts.<sup>85</sup>

Throughout the massive four-volume judgment, the Trial Chamber emphasized the central leadership role of Milošević. He "was able to exert much influence over various Republican, and even Federal, organs and institutions[,]""<sup>86</sup> including control of the Serbian SDB<sup>87</sup> and "formal command over the VJ" during the war with NATO:<sup>88</sup> "[T]here is no doubt that Milošević as the 'Supreme Commander' was at the apex of the command structure of the VJ throughout the conflict."<sup>89</sup> At the Rambouillet negotiations in 1999, Milošević was in control of the Yugoslav–Serbian delegation even though he was not physically present.<sup>90</sup> The direct communication between Milošević and key military commanders in Kosovo, circumventing the formal chain-of-command, was noted;<sup>91</sup> for example, the Chamber concluded that Milošević presided over a body known as the "Joint Command for Kosovo and Metohija."<sup>92</sup>

In painstakingly reviewing the long and torturous history of the international negotiations on Kosovo, the Trial Chamber repeatedly noted the drastic choices presented to the FRY by the international community in the months leading up to NATO bombardment in March 1999. Thus, the Rambouillet negotiations were criticized for bias in favor of the Kosovar Albanians, and the Trial Chamber refused to blame Milošević alone for the failure of these talks.<sup>93</sup> The Trial Chamber found that Milošević and the FRY and Serbian military and political leadership "were understandably reluctant to agree to an international presence in Kosovo[.]""<sup>94</sup> One might question the relevance of these discussions to a narrow vision of the criminal charges, but given that the Trial Chamber was in fact able to hear testimony and read documentation produced by virtually all the key participants in international negotiations related to Kosovo in 1998 and 1999, including the major Serb actors, the trial record gives a nuanced reading of one of the most controversial episodes in Balkan diplomacy of the 1990s, and offers historians a very good point of

departure for a history of the international diplomacy preceding the 1999 war.

As regarded the crimes committed in Kosovo, the Trial Chamber found that Milošević was among those who actively conducted a “clandestine operation involving the exhumation of over 700 bodies originally buried in Kosovo and their transportation to Serbia proper [which] took place during the NATO bombing.”<sup>95</sup> Moreover, the Trial Chamber concluded that Milošević “knew that the great majority of the corpses moved were victims of crime and civilians, including women and children.”<sup>96</sup> Throughout the *MOS* judgment, particularly in volume three, the impression is given that the Trial Chamber had concluded that Milošević was principally responsible for the crimes committed by the Serbian forces in Kosovo, and that the criminal liability of the defendants depended to a very considerable extent on their proximity to, and relationship with, Milošević. This was evident in the judgment’s treatment of Nikola Šainović, who in 1998 and 1998 was Milošević’s personal representative for Kosovo. “His primary role was to implement Milošević’s objectives there and co-ordinate the activities of the VJ, the MUP, and other armed organizations.”<sup>97</sup> By inference, most if not all of Šainović’s conduct reflected the policies and intentions of Milošević, whom the judgment stated “was seen to be the most powerful in the FRY at the time.”<sup>98</sup> In fact, the entire section of the *MOS* judgment exonerating Milutinović results in a thoroughly incriminating portrait of Milošević’s role.<sup>99</sup> Thus although the Trial Chamber was “convinced” that Milošević and Milutinović “met during the NATO air campaign and exercised formal command over the VJ,”<sup>100</sup> the judges expressed “no doubt that Milošević, as the ‘Supreme Commander,’ was at the apex of the command structure of the VJ throughout the conflict. For example, during the NATO bombing, Milošević, but not Milutinović, was meeting with [the Chief of the VJ General Staff] Ojdanić on a daily basis[.]”<sup>101</sup> And as regarded the police, who committed significant crimes in Kosovo, Milutinović’s “less than extensive powers relating to that organ were even more circumscribed by Milošević[.]”<sup>102</sup>

The essential findings of the *MOS* judgment are reiterated in the judgment in the trial of Vlastimir Đorđević, a high-ranking official of the Serbian MUP during the Kosovo conflict. Milošević was found to have



“directed and controlled” the SDB.<sup>103</sup> This was particularly significant, as the SDB controlled the *Jedinica za specijalne operacije* (Unit for Special Operations or JSO) that committed crimes in Croatia, Bosnia, and Kosovo. The *Đorđević* judgment found that, at least on one occasion, Milošević sought punitive measures against the head of a particularly notorious paramilitary group known as the *Škorpijoni*—well-known because of the infamous Srebrenica video that was aired during the *Milošević* trial—but that Milošević “would not hold to account [Minister of Internal Affairs] Stojiljković and Đorđević for the crimes committed by the Scorpions members.”<sup>104</sup> By contrast, the *Đorđević* Trial Chamber found information to indicate “not only that Milošević was aware that such crimes were being committed, but that he intended that they be committed.”<sup>105</sup> And Milošević on several occasions “ordered Stojiljković to take measures to remove all traces which would indicate evidence of crimes in Kosovo.”<sup>106</sup> In July 1999, Milošević issued awards to high-ranking police officials who had been involved in the conflict in Kosovo, including Đorđević and several others later convicted by the ICTY.<sup>107</sup> The Trial Chamber concluded that Milošević was a member of a JCE that had committed substantial crimes in the course of a “campaign of terror orchestrated against the Kosovo Albanian civilian population in 1999”<sup>108</sup> as part of a conscious and intentional element of a common plan.<sup>109</sup> In convicting Đorđević, the chamber also indirectly pronounced a guilty verdict on Milošević by noting that “putting aside Milošević and Stojiljković, who have since died, in the Chamber’s finding, no other member of the joint criminal enterprise made a more crucial contribution to the achievement of its objective [than Đorđević].”<sup>110</sup>

Of all the judgments at the ICTY to date, *MOS* and *Đorđević* judgments yield the most detailed information to date about Milošević’s role in the former Yugoslav conflicts. This may appear somewhat ironic given that some earlier assessments of *Milošević* argued that the *Kosovo* portion of that case was the weakest.<sup>111</sup> Unfortunately the time frame of *MOS* and *Đorđević* means that the judgment largely confines itself to developments in the late 1990s. And as has been seen, with the partial exception of *Perišić*, the judgments from the Bosnian and Croatian cases have been comparatively brief in their treatments of Milošević. Nevertheless, the outlines of Milošević’s role, and in particular his



relationship with other important Serb political and military leaders, do emerge from these judgments. One should also not forget the extensive and much more detailed information available about Milošević in the transcripts of these cases and, of course, in the documentary and electronic evidence tendered by both the Prosecution and the Defense. Judgments, even ones as lengthy as those at the ICTY, will always be able to cite only part of the relevant evidence.\* Much more documentation awaits the intrepid researcher.

## IV. Conclusion: *Milošević's First Draft*

At a very banal level, *any* trial of Slobodan Milošević was always going to be a monumental event. The first international criminal trial of a head of state was perceived both internationally and in the former Yugoslavia as the “trial of the century” and “a historical trial.” But was it good history?

As noted at the outset, this chapter is part of a larger scholarly project examining the intersection of history and international criminal justice. This particular research is to a considerable extent motivated by the tendency in international and former Yugoslav media to pronounce the ICTY a failure because the *Milošević* case did not succeed.<sup>112</sup> Such views can also be found in the scholarly literature, where even internationally renowned experts have at times conflated the *Milošević* trial with the ICTY as a whole. For example, Michael Scharf wrote in 2003 that *Milošević* “is clearly the trial for which the Ad Hoc Court was created. Thus, the answer to these questions may dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans.”\* And James Gow and Ivan Zverzhanovski claimed in 2004 that “despite the large number of cases handled by The Hague, it is the *Milošević* trial that will define the Tribunal’s success or failure in the eyes of the world and of history.”<sup>113</sup> Such facile verdicts on the Tribunal ignore the innovations that the ICTY has contributed to international jurisprudence, as well as the mountains of documentation that the ICTY has made available for generations of researchers to come. By examining other judgments at the ICTY, we can see the interlocking narrative about the conflicts in the former Yugoslavia that can be constructed if one is

willing to look beyond *Milošević* and see it in its full context. Viewed from that vantage point, the trial of Slobodan Milošević was not in vain, and the evidence and documentation first introduced in that trial have not been consigned to oblivion.

Historians need to understand the *Milošević* trial and its documentary record in the context of all of the trials processed at the ICTY (and in the extraordinary war crimes courts of the former Yugoslavia).<sup>†</sup> To the extent that the Prosecution erred in trying to achieve too much through *Milošević*, the scholarly emphasis on this particular case perpetuates a distortive reading of the conflict in the former Yugoslavia. Here it can be useful to compare with the main trial at Nuremberg. The trial itself, as well as its documentary record, made a unique and incomparable contribution to the history of Nazi Germany and World War II. The main Nuremberg trial was the first to convey to the international public the magnitude of the Holocaust. However, as numerous scholars have pointed out, the proceedings and judgment in the trial also revealed significant shortcomings in the understanding of the scope and modalities of the destruction of European Jewry.<sup>114</sup> Decades of research and vociferous scholarly debates (e.g., “intentionalism” versus “functionalism”)\* resulted in an extremely detailed and nuanced historical record that can still surprise us with new revelations. The at-times myopic focus on Milošević, mentioned earlier, and the search for the proverbial “smoking gun” linking him to the crime scene reminds us of attempts at Nuremberg and by later historians to locate the documents in which Adolf Hitler ordered the “Final Solution.” For some time, this quest obscured the extensive involvement of a bureaucratic apparatus and “ordinary people” (and not just Germans) in the Holocaust.<sup>115</sup> Seen from this vantage point, *Milošević* is indeed the beginning and not the end of the historiography of the former Yugoslav conflict.

As with most of the trials at the ICTY, the ultimate legacy of *Milošević* resides in the court records, and particularly in the exhibits introduced at trial. Many if not most of the documents and testimonies used in *Milošević*, which were of course only a portion of the Prosecution’s total collection, might never have seen the light of day if the Tribunal and the trial had not existed. At a minimum, most of this information came out decades before it normally would have according to most laws on national

archives.<sup>†</sup> Paradoxically, the same avalanche of documents, transcripts, and audio and video recordings that dismayed the Trial Chamber and the Accused's legal advisor in *Milošević* represents a treasure trove of epic proportions for generations of historians: in excess of 1.2 million pages; 46,000 pages of transcripts; a record of more than 85,000 pages; and Prosecution exhibits and over a hundred videos as of late November 2005.<sup>116</sup> Of course, the Defense and Milošević also produced significant documentation, not least in the form of Milošević's own indirect testimony through his examination and cross-examination of witnesses during his trial. All of this is a tremendous boon to the existing literature on Milošević and will enable scholars to produce much more detailed and nuanced accounts of him and his regime.<sup>117</sup>

Looking beyond the already considerable documentary scope of the trial, the historical record and understanding of the role of Milošević emerging from other trials at the ICTY have to date tended to complement the *Milošević* Trial Chamber's Decision. Of course, the historical record of the Tribunal continues to grow, promising further refinement and clarification of Milošević's legacy. Of the trials or appeals still to be concluded at the Tribunal, the most important for an evaluation of Milošević's role are *Karadžić*, *Mladić*, and *Stanišić & Simatović*. In *Karadžić* and *Mladić*, the relationship between Milošević and the Bosnian Serb leadership and military for the period from 1990 to 1995 has been or is sure to be analyzed in detail.\* Finally, the focus of *Stanišić & Simatović* on the Serbian SDB and its alleged crimes in Croatia and Bosnia ensures that the responsibility of Milošević dominated much of the trial and its judgment, although Hartmann suggests that the Prosecution's focus had shifted in important ways that lessened the ability for the trial to ascertain Belgrade's role.

Lest there be any misunderstanding, this chapter has *not* argued that the ICTY has produced a flawless record about the conflicts in the former Yugoslavia, or that historians can therefore relax and move on to other pastures. Rather, cases at the ICTY, including the *Milošević* trial, have produced a *reasonable* first draft of the history of the conflicts in the former Yugoslavia. This draft aligns *reasonably* well with the vast scholarly literature available on the dissolution of the former Yugoslavia, including much of that produced in Serbia since the fall of the Milošević regime. The book *Confronting the Yugoslav Controversies* by the Scholars'

Initiative reaches many of the same conclusions that the ICTY has in its judgments, and also illustrates the increasing tendency of scholars of all persuasions to cite material obtained through the proceedings at the ICTY.<sup>118</sup> For example, the multinational teams headed by Dušan Janjić and James Gow were tasked to produce a communal chronicle of Kosovo under the Milošević regime and the war in Kosovo, respectively; their accounts agree to a very considerable extent with the factual findings of ICTY judgments. The ICTY has bequeathed a vast collection of primary sources to historians, and it is essential that these sources continue to be made available to as many scholars as possible, as well as to the broader public in the former Yugoslavia.<sup>†</sup>



## Do Historians Need a Verdict?

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*The question a court asks is different from the questions historians ask, and the evidence likewise has very different purposes; also, a final verdict may actually serve to inhibit academic debate, whereas in Milošević there is only uncertainty and contestation, leaving more space for debate to emerge. There is little doubt that without the ICTY, the history of the Yugoslav wars would be written differently, and future scholarship will benefit from the sources made available through the ICTY in ways we cannot anticipate. Yet at the same time, the Tribunal is not the scribe of history: A verdict in the Milošević trial would have not provided a breakthrough in scholarship on the dissolution of Yugoslavia. Most contemporary scholarship assigns Milošević a central role in the dissolution and the subsequent wars, and does so even in the absence of a decisive declaration by the Tribunal. However, the process by which the Tribunal constructs its own historical record features important points of communication with and difference from conventional scholarship. Historians would be ill-advised either to ignore the evidence gathered by the ICTY or to uncritically rely on it without reflecting on the methodological differences and similarities between the tasks of lawyers and of historians, each creating their own narrative of events.*

## Introduction: How Central Is a Verdict?

Slobodan Milošević's untimely death before the end of his trial was a setback for human rights and transitional justice, but it is less clear that historians exploring the dissolution of Yugoslavia and its wars were similarly disadvantaged in their research by the lack of a verdict. In his chapter, Nielsen suggests that the Rule 98*bis* Decision might serve as a useful replacement for the missing verdict. However, we might as well ask if scholarship needs either.

Implicit in Nielsen's inquiry is the question of whether history can be written by trial—even if only, as he argues, as a first draft. Ever since Nuremberg gave crucial impetus to the study of the Holocaust, war crimes trials and scholarship have been closely intertwined, and this has been true for the Tribunal and study of the Yugoslav dissolution. At the ICTY, scholars regularly have been witnesses for both the Prosecution and Defense. In turn, academics have begun to draw on the materials disclosed in court to (re)write the histories of Yugoslavia's disintegration—arguably, no history of this period can afford to ignore the materials made available at the ICTY.<sup>1</sup> In addition, a plethora of more or less academic titles have been devoted to the ICTY itself. It is, however, not a relationship without difficulties. The purpose of this chapter is not to explore all the details of this relationship, but just one particular aspect, especially as it relates to the *Milošević* trial: What significance does a verdict—or the lack of one—in a war crimes trial have for the writing of history?

Certainly, a court cannot be a replacement for the work of historians. Even if a court were understood to produce “definitive histories of conflicts[,]”<sup>2</sup>—a view Nielsen clearly does not subscribe to—the judicial process inherently focuses on determining the guilt of an individual: The historical record it reveals is inherently a by-product, not its purpose.<sup>3</sup> So, in order to assess how central a verdict—and the process of reaching one—is for scholarship on Yugoslavia, this chapter considers three aspects: the questions asked in court versus the questions asked by scholars; the role of evidence that a court amasses; and, finally, the significance of the verdict itself.

# I. The Question

At the center of a criminal case, including a war crimes case, is a question: Is the defendant guilty of the crimes accused? Any evidence not helping to prove or dismiss this question is irrelevant to this core inquiry. Viewed in this way, the rich context presented in the *Milošević* trial, from the historical background provided by Audrey Helfant-Budding,<sup>4</sup> to the Prosecution's emphasis on the political plan of the Accused, including Milošević's purported political goal of a Greater Serbia, are in fact indications of weaknesses in the Prosecution's case. Had the Prosecution possessed clear evidence—a “smoking gun” linking Milošević directly to the crimes he stood accused of—these elements of context and background would not have been necessary.\*

Quite apart from its relevance, the particular historical interpretation advanced by the Prosecution is unhelpful for understanding the dissolution of Yugoslavia. When Geoffrey Nice argued for the joinder of the three indictments against Milošević, he said it was warranted because of a “common scheme, strategy or plan, namely the accused Milosevic's overall conduct in attempting to create a—in quotation marks—‘Greater Serbia,’ a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and Herzegovina and all of Kosovo.”<sup>5</sup> Although such a view might have been useful—even necessary—for the Prosecution's purposes in seeking joinder,\* few scholars would argue that Milošević had a clear political vision underpinning his use of violence. More scholars and journalists agree that—from the use of violence to demobilize the opposition,<sup>6</sup> to his attempts to draw on nationalist support<sup>7</sup>—Milošević was mostly motivated to secure his own power, rather than by any specific political or ideological project.<sup>8</sup> Indeed, in his chapter, Prelec argues that—the Prosecution's preferred arguments notwithstanding—the evidence actually introduced at trial supports this view of Milošević. The argument that Milošević ordered or oversaw war crimes as part of a clear plan, including a political vision or ideology underpinning the crimes, was central for the Prosecution case due to the weakness of documentary evidence clearly linking Milošević to the crimes he stood accused of, and because of the formal logic of the legal standards for joinder. However, for scholarship this is not particularly compelling.

In addition, for historians and other scholars, the answer to a particular question is less interesting than the path of getting to it. To put it differently, if the trial at hand were not a war crimes case, but a simple murder in which the one person stood accused of killing another, the court will want to know whether A killed B or not. The historian will want to know the facts about this as well, of course, but will also be curious as to why A wanted to kill B, what the context in which the murder took place was, what the relationship between A and B was before the murder, and so on. For a court, in most cases, these kinds of questions are matters of motive, which are usually legally irrelevant.<sup>†</sup> The court will only resort to these sorts of inquiries if it lacks clear evidence proving that A is indeed the murderer—that is, evidence directly addressing its core concern.

In this sense, the absence of clear and easily demonstrable evidence linking Milošević to the crimes—and the more exotic or tangential forms of evidence which that absence led the Prosecution to rely upon—may have made this legally a less satisfying case, but this is precisely what makes it more interesting for historians, even if many would not share the Prosecution's evaluation. Thus the apparent convergence between the lawyers and historians that the rich historical material introduced at trial suggests should not distract us from recognizing their fundamentally different interests in that material. The question of Milošević's direct responsibility for the crimes is only one of many that scholars will be dealing with, and possibly not the most interesting one.

The historiography of the Holocaust can be instructive here in understanding the interrelationship between conducting trials and writing history. As Nielsen notes, one key debate within historiography of the Holocaust has been the dispute between intentionalists and functionalists. Whereas functionalists focus on the structures that allowed the Holocaust to occur, intentionalists place Hitler in the center of their scholarly attention and focus on the ideology of the Holocaust. After a peak of this debate in the late 1970s and early 1980s—before the much better known *Historikerstreit*—the stark opposition of these interpretations no longer seems particularly compelling; today, most scholars would argue that a combination of both approaches is essential, as structures and particular circumstances are necessary to understand the Holocaust, whereas the ideology, in particular of the Nazi leadership, is equally essential.<sup>9</sup> Much of the significant scholarship in the past 20 years has sought to move



beyond this particular debate.<sup>10</sup> Since then, the most interesting and relevant scholarship has not been concerned with showing the degree to which Adolf Hitler ordered the Final Solution—the kind of question a court might be equipped to address—but rather focuses on the circumstances that enabled the Holocaust to take place and how individuals at different points in the echelons of authority participated or refused to.<sup>11</sup>

Similarly, recent literature on the wars in Yugoslavia has been less concerned with determining the extent to which Milošević was directly responsible for the crimes committed,<sup>12</sup> but instead has focused on, for example, micro-mechanisms of violence<sup>13</sup> and the internal dynamics of radical movements.<sup>14</sup> Few of these studies would deny the centrality of Milošević: On the contrary, the literature assumes his responsibility and centrality, but asks different questions.

## II. The Evidence

If the Tribunal can at best provide only one history, and addresses a set of historical questions which scholars might not find particularly relevant, it has nonetheless been extremely effective at revealing the historical record.

The Prosecution produced over a million pages of documents. What might have been a challenge for Milošević and his legal team—and the judges—to read is a treasure trove for researchers. Much of the information the Tribunal has made available through its proceedings might never have become accessible to researchers, or only after several decades. Beyond the documents, the transcripts of the case, the statements of the Accused and witnesses constitute a rich trove of materials that will contribute to the scholarship on the dissolution of Yugoslavia in as yet unpredictable directions.

The sheer volume of information might suggest that the *Milošević* trial offers us a comprehensive record, or at least a comprehensive source of information. But vast as the record is, it is still selective, and the selection is purposeful in ways that reflect the core question motivating a trial: The Prosecution seeks to prove the guilt of an accused, who in turn seeks to prove his innocence. As such, the record built up by the *Milošević* trial, as

well as that of other cases at the ICTY, is incomplete. Those sifting through the materials and presenting them in court are expected to subordinate evidence to building a case; \* incriminating evidence about individuals not on trial might only be included if it serves the purpose of the Prosecution or Defense.<sup>15</sup> This is of course also a temptation among scholars, but would be considered biased scholarship, whereas at the Tribunal, it is an expected, even normative part of the predominant adversary model. The evidence amassed during the trial thus cannot be considered complete, and cannot be appreciated without accounting for its structural, purposive bias.

That same purposive structure of trial extends beyond just making documents accessible to historians, however; rather, the very process of trial imparts information about the qualities of those documents that, in turn, historians may usefully employ. As lawyers debate and judges consider the veracity and probative value of particular documents for the specific purposes of trial, they indirectly provide context and background on these materials for scholars. This includes sources already in the public domain but that receive additional scrutiny through the trial process. When Vojislav Šešelj spoke as a witness for the Defense in *Milošević*, the Prosecution played an excerpt from the well-known BBC documentary *The Death of Yugoslavia*, in which Šešelj explained that his paramilitaries “were getting weapons from Milosevic’s police from the then ... Minister of Internal Affairs Radmilo Bogdanovic and when he was replaced from his successor.”<sup>16</sup> In the trial, Šešelj did not deny the content of the interview, but explained that “for reasons of political propaganda, I threw Mr. Milosevic and Radmilo Bogdanovic into the entire story, wanting to annoy them and to cause on their part an improper political reaction.”<sup>17</sup> Without seeking to resolve the question of whether Šešelj was lying to BBC journalist Laura Silber in 1995 or to the Chamber in 2005 (and again in 2008<sup>18</sup>), the incident demonstrates how the Tribunal provides a feedback loop on the literature and sources of Yugoslavia’s dissolution.

The exchange with Šešelj also raises larger questions about the credibility of evidence in a context in which particular pieces of evidence do not ruin a good academic article, but can either help send an indicted war criminal to jail or set him free. The problems of veracity are of course not only of concern for prosecutors, defendants, and judges, but also for

the historian working with the trial record.\* Many of the problems arising from testimony are familiar to historians who have worked with interviews and especially oral history,<sup>19</sup> and lawyers at international tribunals have even been likened to oral historians.<sup>20</sup>

However, whereas the oral historian is less interested in approximating a particular “truth” and chooses the method because it is subjective, the reconstruction of an objective truth is more central to the work of a court.<sup>21</sup> Moreover, the functional convergence of oral history and legal testimony is ironic, as oral history often places particular emphasis on recording stories of communities that lack a strong written record or of disempowered groups with little influence on how written texts refer to them,<sup>22</sup> whereas the focus of war crimes trials in leadership cases, such as *Milošević*, is normally on actors who, by definition, were not marginal, and were surrounded by massive volumes of documents.<sup>†</sup> Nevertheless, the reconstruction of the wars and the responsibilities for crimes committed is impossible without testimony, which shares functional analogues with oral history and is therefore of practical value to historians.

Still, the analogy is partial: The emphasis on evidence and on unearthing the “truth” in court proceedings diverges from the norms of historiography since the 1970s, which has rejected the strictly positivist aspiration to uncovering the raw material of history. The challenge to positivism in history and the constructivist turn in social sciences and humanities has meant that even if does not reject the positivist approach to historical evidence outright, the relationship between evidence and reality cannot be taken for granted.<sup>23</sup>

### **III. The Decision**

In discussing the value of the interim Rule 98*bis* Decision, the question Nielsen’s chapter (and Waters’ as well) implicitly raises is whether a final verdict in the *Milošević* case would have answered the question of legal responsibility in a way that would have provided the basis for a scholarly

consensus on the responsibility of this key protagonist of the Yugoslav wars.

Of course, by consensus we cannot mean literal universality: Those strands of revisionism that absolutely deny Milošević's responsibility would not have been affected by a final ruling, the more so as such authors generally do not accept the ICTY as a legitimate institution.<sup>24</sup> But such voices are arguably as irrelevant to the scholarly debate on the wars of Yugoslavia's succession as Holocaust deniers are to the study of Holocaust.

More serious is the question about the weight mainstream historiography might have given a verdict. If the evidence is public, the verdict of the Chamber would have been little more than an opinion about that evidence—though one with legal consequences—and scholars analyzing the same body of evidence might arrive at a different conclusion.<sup>25</sup> The judges might have had the advantage of following all the evidence as a full-time job, but historians will have a longer time horizon and more familiarity with the context and languages. Thus, whatever its legal consequence, a judge's verdict cannot be the ultimate interpretation of particular *historical* events. Nor can any one historian's interpretation—in historiography, unlike in law, there is no last instance. A particular interpretation of events might enjoy consensus within the discipline at a given point, but this does not mean that new evidence, or even simply new approaches to the same evidence, could not “re-open the case.”

Thus, for historiography, the verdict is arguably less important than the trial itself. From this perspective the *Milošević* trial provided the substance without the conclusion—but the conclusion is less important for historiography of Yugoslavia's dissolution. Indeed, to the degree a verdict does affect or constrain historical analysis, the lack of a verdict leaves more space for debate to emerge. The closure that a verdict provides can inhibit further academic debate, but in *Milošević*, there is only uncertainty and contestation.



## IV. Conclusion: Where Historians and Lawyers Meet

There is little doubt that without the ICTY, the history of the Yugoslav wars would be written differently. The mass murders in Srebrenica would probably be less widely called genocide without the verdict in *Krstić*. Without the ICTY, the links between Serbian state institutions, the RS, RSK, and paramilitaries in Bosnia and Croatia would be less well-known. Innumerable details of great consequence for our understanding would still be waiting to be discovered years or even decades from now, once archives opened their doors—and some would doubtless have been destroyed or lost in the meantime. Future scholarship will benefit from the sources made available through the ICTY in ways we cannot yet anticipate.

The eminent historian Carlo Ginzberg reflected at length on the relationship between the judge and the historian and noted that the law's very positivist understanding of evidence and proof should not be dismissed by historians, yet at the same time, the purpose of "proof" is different for historians than for judges, as "historical research should be, I think, the reconstruction of the relationship (about which we know so little) between individual lives and the contexts in which they unfold."<sup>26</sup> This context is not and should not be the primary concern of a court, or of the judges who actually reach the verdict.

The Tribunal is not the scribe of history. A verdict in the *Milošević* trial would not have provided a breakthrough in scholarship on the dissolution of Yugoslavia. Already today, most scholarship attributes to Milošević a central role in the dissolution process and the subsequent wars, and does so even in the absence of a decisive declaration by the Tribunal. If a verdict was not central for scholarship on Milošević and Yugoslavia, as it appears not to have been, the premature end of the trial due to Milošević's death is less significant.

However, the process by which a tribunal constructs its own historical record features important points of both communication with and difference from conventional scholarship. Most important, historians might safely consider any verdict in a war crimes trial only as one piece of the puzzle in reconstructing particular events. In equal measures, they

would be ill-advised either to ignore the evidence gathered by the ICTY or to uncritically rely on it without reflecting on the methodological differences and similarities between the tasks of lawyers and of historians, each creating their own narrative of events.

## Body of Evidence

### The Prosecution's Construction of Milošević

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*Did the Milošević trial leave the public with a truthful image of Slobodan Milošević, the Yugoslav wars, and his role in them? The Prosecution portrayed Milošević as the man most responsible for the atrocities committed in wars in Croatia, Bosnia, and Kosovo. This image was built up from the Tribunal's earlier case records, in which Milošević had figured as the wizard behind his curtain, and from a decade of media commentary. In several important respects the evidence uncovered during the trial showed this image to be largely false: His relationships with the Bosnian and Croatian Serb leadership, and with Ratko Mladić, were all very different from what the Prosecution sought to prove. The ICTY has left the public with a narrative of Milošević and the war that is in many important respects simply wrong. This raises serious questions about the ICTY's role in establishing the truth and changing attitudes in the Balkans.*

Just before noon on 6 December 1995, Slobodan Milošević addressed the assembled chiefs of the VJ, to inform them of the results of the Dayton peace talks. He had to explain the end of a war that had bankrupted his country and taken many Serb lives. These men had been deeply involved: NATO had bombed their Bosnian Serb kin, some of whom were professional colleagues; and now those colleagues would play host to NATO as it occupied all of Bosnia. Maybe there was some anxiety. If so, it passed quickly. “As briefly as possible, the results! When the result is clear, then it doesn’t need a lot of explanation. In a word—we succeeded!” Then he excused himself to take a phone call from Jacques Chirac.<sup>1</sup>

When he came back, Milošević was furious. “I think the *Vojska Republike Srpske* [VRS] and [commander of the VRS Main Staff Ratko] Mladić personally are acting in the worst, most immoral way,” he said. Mladić, a highly respected officer with decades of personal connections among the VJ brass—and on paper still a serving VJ officer—had fewer than three weeks earlier been indicted by the ICTY for the mass murder of eight thousand Bosniak men and boys from the United Nations safe area around Srebrenica.<sup>2</sup> This, the most notorious European crime of the second half of the 20th century, was not on Milošević’s mind on this day. He was enraged by something that seemed, to him, even worse:

They took the pilots prisoner, had their pictures taken with them, and now they’re trying to sell us a story “how someone kidnapped them and they don’t know where they are!?” Not even an infant could believe that story, and they expect someone else in the international community to believe a story like that!? They’re playing with the fates of millions of people and relations between countries, because of their whims or because they want to sell those two pilots for some personal guarantee of theirs!? I think that has nothing in common with military honor! It is the worst military dishonor and criminal behavior toward the state and toward persons. By the way, mistreating a prisoner of war is a war crime, among other things! Killing a prisoner of war is a war crime! The pilots were photographed alive with their officers. Therefore, if anyone did anything to them afterward, he’s committed a war crime!\*

In the remainder of his long speech, to which we shall return, Milošević subjected Mladić, Radovan Karadžić, and the Bosnian Serb leadership to a torrent of abuse:

We saved the existence of Republika Srpska and we established Republika Srpska, despite all the crimes they committed to destroy Republika Srpska. Everyone who died over the last two years died in vain! All the territory lost over the last two years didn’t



have to be lost, you could have drawn a map in those conditions, of course, half-half; it can't be otherwise! It can't be otherwise—I told them that two years ago, 'My dear sirs, you have to stop thinking about what you want, you have to think about what you deserve. We Serbs don't merit more than half of Bosnia and Herzegovina, we can't get any more! Because we're a third of the population.... Can you even imagine squeezing two thirds of the population into 30 percent of the territory, while 50 percent isn't even enough for you? Is that humane, is that just?' And do you think they understood that? No way!<sup>†</sup>

In the whole speech, Milošević only mentioned Srebrenica once—as an example of the success of Serbia's negotiators (that is, of himself) at Dayton. Srebrenica and the Drina valley towns, he pointed out, were all included in the RS, even though none of them had a Serb majority before the war.<sup>3</sup>

It was a bravura performance by a master at the peak of his powers, full of confidence, freshly back from Dayton where he had been acknowledged as the indispensable peacemaker, now casually taking calls from world leaders as he cemented the loyalty of Yugoslavia's political and military elite. However, Milošević's triumph would be short-lived. He never managed to convert the glow of Dayton into lasting western support, and soon became entangled in a conflict with Kosovo's long-suffering Albanian population. Fewer than four years later, he would fight and lose a war with his Dayton hosts and their NATO allies. That war, in which forces under Milošević's command killed thousands and expelled hundreds of thousands of Kosovars, led to his indictment and trial, which brought to light the secret transcripts of his meetings.

How do we explain this? Set aside for a moment the bizarre moral calculus, in which the publicized fate of two French airmen weighed more heavily than that of eight thousand anonymous locals. This kind of distortion was not unique to Milošević—neither Chirac, nor anyone else was interrupting Milošević's day to demand justice for Srebrenica. Consider instead whether this sounds like a man who, as many believed and the ICTY would later charge, had devised, planned, and directed the Bosnian Serb war effort, complete with genocide, ethnic cleansing, and other horrific crimes. Is this the voice of the Butcher of Belgrade, the mastermind of Greater Serbia and all its pawns and schemes?

## **I. Mind and Body: The Prosecution's Theory**

The ICTY sought to answer this question by means of a criminal trial in which Milošević's central role in the Yugoslav wars would be explained, proved, and condemned. Though it ended suddenly with the death of the Accused before judgment, the trial record remains and can be analyzed. It provides a case study for ICL at its most ambitious, and by examining it we can begin to judge the Prosecution's work: Did it provide a truthful image of Milošević?

The Prosecution was convinced that Milošević was the central, and centrally culpable figure in the conflict. This image was built up from the Tribunal's earlier case records, in which Milošević had figured as the wizard behind his curtain, and from a decade of media commentary. But, the Prosecution also faced a dilemma common in ICL: When is the leader of one state criminally responsible for acts committed by agents of another? There are three ways such responsibility can be incurred: hierarchically (by means of control over the foreign perpetrators), conspiratorially (by means of cooperation in a JCE), or as an accessory (by aiding or abetting).<sup>\*</sup> All three are controversial, have been litigated extensively at the ICTY and elsewhere, and have provided the subject matter for a growing library of scholarly debate and commentary.<sup>\*</sup> Reluctant to pin itself down, the Prosecution pled all three theories, while emphasizing Milošević's role as architect and presiding genius of the JCE.<sup>4</sup>

The Prosecution set out to prove, in most concise terms, that Milošević bore responsibility because he "controlled the people who constituted the body that ... did evil."<sup>5</sup> This body was the JCE—a group of people who coalesced around a plan "to impose and maintain Serb control over targeted regions of the former Yugoslavia by forcibly removing Muslim, Croat, Albanian, and other non-Serb inhabitants through persecutory campaigns."<sup>†</sup> Milošević's role in this plan was said to be "planning, enabling and directing" a campaign of power grabs throughout former Yugoslavia, coupled with the diverse forms of persecution commonly referred to as ethnic cleansing.<sup>6</sup> After setting out in detail the criminal plans laid in Bosnia by Karadžić—plans in which Milošević barely figured

save as a political advisor and quartermaster for Serb needs in general—the Prosecution summarized its theory:

In the campaign from 1991 to 1995 to achieve and maintain the “liberation” of territories and to “link Serbian territories with mother Serbia,” grave violations of international humanitarian law were committed by individuals acting through state organs and other bodies formed, supported and directed by states. The state organs and the other bodies do not bear institutional responsibility for these violations. It is the individuals who control and work their criminal purpose through these bodies that are responsible. [Milošević] is the man to whom all these bodies connected. He is the individual from whom the authority to persecute and maltreat non-Serbs derived.<sup>7</sup>

Evaluating this theory requires an examination of the limbs with which Milošević reached across the Drina. This chapter considers two: logistical and administrative support to the VRS, and Serbian paramilitary forces fighting in Bosnia. Then there is the spine, the relationship between Milošević and Ratko Mladić. The consequences of these relationships for Bosnia can best be seen in two scenes: the siege of Sarajevo and the genocide at Srebrenica, the war’s most notorious crimes.

The picture gradually revealed by the accumulation of the Prosecution’s evidence in the *Milošević* case is fascinating and compelling, but fits awkwardly with the Prosecution’s principal theory—which sought to prove Milošević’s responsibility for crimes in the Yugoslav wars—and in places contradicts it. It was easy to prove that horrible crimes took place, perpetrated by often anonymous Serbs acting on some kind of orders or instructions issued by various Serbian political or military leaders. The ICTY tried many cases of this kind; their indictments had been combined to produce the *Milošević* indictment.\* But it was hard to say what connected these men (and one woman) to Milošević, and why he should answer for acts carried out on their orders. The belief, almost universally held in former Yugoslavia, that Milošević was “the most powerful leader in former Yugoslavia”<sup>8</sup> was not in itself a link sufficiently strong to bear the weight of criminal culpability.

The focus on a chain of individual responsibility culminating in Milošević was both a necessary artifact of the Tribunal’s jurisdiction and a product of ICL’s worldview, which believes that individualizing guilt breaks cycles of collective recrimination and paves the way for reconciliation.† But the nexus between collective action and individual



responsibility does not reduce neatly to categories recognized by the criminal law. It also raises a question: When political goals that are repellent but not criminal—such as controlling disputed territory to which another polity has a stronger moral claim—are pursued by criminal means, what responsibility attaches to the planners of those goals? Evidence of Karadžić and other Bosnian Serb leaders’ planning to seize power and break apart Bosnia is abundant,<sup>9</sup> as is Milošević’s role as advisor and mentor in these plans; as it happened, the Bosnian Serb leadership implemented those plans through ethnic cleansing, but here the evidence of Milošević’s role is in places absent, in others exculpatory.

## **II. The First Limb: Arms and Men**

The trial record, truncated though it is by the death of the Accused, is sufficient to conclude that Milošević was deeply involved in approving Serbia’s and the FRY’s provision of military supplies and other aid to the RS and RSK. Through the VSO<sup>‡</sup> Milošević helped set policy for the administration of salaries and benefits for several thousand Serb officers detached from the JNA and incorporated into the VRS. The VRS would have found it very hard, even impossible, to act as it did without this support.

Milošević broadly supported the RS against criticism of the war’s expense when costs rose and the war dragged on into its first winter. In December 1992 he spoke of “our obligation and responsibility to help the [RSK] and [RS]” and argued that “we should see how we can help them with what they need most ... in terms of materiel, equipment” and by deporting Bosnian Serb draft-dodgers from Serbia “who in any case must return to the field to defend their homes.”<sup>10</sup>

By mid-May 1993, the FRY was still paying the salaries of about 2,390 VRS officers, of whom 890 were regular VJ officers ordered into Bosnia by the then-chief of the JNA general staff, Blagoje Adžić, in May 1992.<sup>11</sup> Some of these were JNA officers born in Bosnia and deployed there during the breakup of Yugoslavia, but the 890 were in effect seconded to the VRS with every expectation they would eventually return to posts kept open for them in the VJ.



The VJ also set policy on when certain weapons could be used. The VJ was very short of anti-aircraft ammunition “because the VRS are firing at targets on the ground and they keep asking” for more, but were in better shape with anti-aircraft rockets “because we have not yet allowed” their use against ground targets.<sup>12</sup> Neither threats nor public announcements of an embargo of military aid ever actually led to a lasting cutoff; as late as August 1995 the VSO was still worrying over whether to condition “all further military aid on [RS] acceptance and implementation of the policy of the FRY leadership.”<sup>13</sup>

All of this was vastly expensive. When the financial burden became truly serious—at one point FRY Prime Minister Radoje Kontić exclaimed that they could not print money fast enough to pay for the army and aid to RS—Milošević at first defended the Bosnian Serbs: “they’re not asking for money, they only want ammunition, equipment, food, clothing.... we cannot leave them to die of hunger!”<sup>14</sup> Milošević claimed that the FRY was spending 19 trillion dinars on military aid in the first quarter of 1993.<sup>\*</sup> There was also nonmilitary aid related to the Bosnian Serb war effort—food, medicine, fuel, and the like. All this imposed staggering costs on Serbia.<sup>†</sup> By October 1993 aid to the RS was cutting so deeply into the VJ’s reserves that Chief of the General Staff Momčilo Perišić worried about the army’s ability to defend the country.

The ruinous expense eventually drove Milošević to insist on ending the war, and fueled his growing rage against the stubborn Bosnian Serbs: “Let’s be clear about one thing. We have made enormous sacrifices.... we sacrificed practically everything; this huge inflation is the result[.]”<sup>15</sup> His attitude sharpened after Karadžić and the Bosnian Serbs rejected the Vance-Owen peace plan, which had offered them almost half of Bosnia in the first half of 1993:

up to this moment we have worked [like so], if we had to cut off our hand, we cut it off; if the water had to rise over our heads, then it was over our heads; we gritted our teeth, we endured everything. But from this moment on we have no right to do that. If it’s come to destroying the economy of this country, these 10 million [people] over here, then go ahead, gentlemen, and resolve the rest at the [negotiating] table.<sup>16</sup>

The same issues were still acute a month later when Mladić visited Belgrade to meet with Milošević and VJ Chief of Staff Života Panić, a

visit he recorded in his notebook. Milošević made similar points: “The war must end as soon as possible!” He advised Mladić, “offer the Muslims acceptable options ... but destroy their positions on the front” lines. Panić mentioned the option of funding salaries with loans, warning that although “the officers must not be abandoned,” nonetheless “we must differentiate matters between the VRS and the VJ.”<sup>17</sup> Still, the aid continued to flow, at times in reduced volume, to 1995 and after.

Evidence of Milošević’s logistical and financial support to the Bosnian Serbs is abundant, and the Prosecution presented it. Yet absent evidence that Milošević had direct authority over the forces committing the crimes, or shared the intent to commit ethnic cleansing (rather than merely the hopes of winning recognition of Serb statehood west of Serbia proper), it is hard to see how that assistance proves his liability for Bosnian Serb crimes—at least, for the crimes the Prosecution charged him with and under the theories that have found favor at the Tribunal: The Appeals Chamber’s later acquittal of Perišić focused the contours of aiding and abetting in ways that would make a conviction in *Milošević*, much more difficult to contemplate. For all the support, the distinction among the three military structures, and between VJ officers serving in the VRS and their VJ colleagues in Serbia and Montenegro, was clear to Milošević: The RS has “formed a state, formed an army; those are officers of that army. Let’s not deceive ourselves that these are officers of the [VJ].”<sup>18</sup> At the same meeting, Momir Bulatović, president of Montenegro and thus a member of the VSO, elaborated: “we have to be correct toward our officers: to give them a choice to come back to their posts, if they wish; but it should be clear that from now on there is no more equal sign between officers of the [VRS] and the [VJ], because the [VJ] has to follow and respect the orders of the state leadership.”<sup>19</sup>

The trial turned up few traces of hierarchical subordination or conspiratorial scheming, and not because of Milošević’s skill in operating from the shadows; the evidence was hard to find because it did not exist. The evidence uncovered by and presented at the *Milošević* trial showed that Serb leaders and armed forces in Bosnia were much more independent than commonly thought.

## **A. The first scene: Sarajevo**

One of the most notorious crimes charged against Milošević—the shelling and sniping campaign that terrorized Sarajevo from 1992 to 1995—shows this clearly. The first problem with connecting Milošević and the siege stems from the indictment itself, which charges Milošević with “a military campaign of artillery and mortar shelling and sniping onto civilian areas of Sarajevo and upon its civilian population.”<sup>20</sup> The Prosecution put the *Bosnia* indictment together using parts of its many existing Bosnia cases; for the Sarajevo charges, that meant the cases against the Bosnian Serb Generals Stanislav Galić and Dragomir Milošević, and the Sarajevo part of the case against Karadžić and Mladić. This was consistent with the Prosecution’s general strategy, but it also left a gap. The largest number of killings, especially among the encircled Bosniak civilians, took place between May and September 1992, the first months of the war. The Bosnian Serb generals charged for crimes in Sarajevo in other cases were in command only from September 1992 on, and all of the enumerated incidents around Sarajevo in the *Milošević* indictment stem from that later period; although the indictment speaks of shelling and sniping between April 1992 and November 1995, the earliest specific incident listed is in November 1992.<sup>21</sup> The absence of evidence concerning Sarajevo during the early summer of 1992 made it harder to connect Milošević to the crimes there.\*

One way the Prosecution tried to demonstrate Milošević’s control and responsibility for the siege was through the VSO. Yet the VSO deliberations show that neither Milošević, nor any other VSO member, shared the Bosnian Serb leadership’s appalling goals with respect to Sarajevo, and that the VSO members considered the siege of Sarajevo a disastrous folly.

During the early months of the war—a period of intensive ethnic cleansing and mass killing throughout Bosnia—evidence of Milošević’s views is scant. The VSO first met in July 1992 and its early meetings focused on the endgame of the Croatian war, notably a now-obscure dispute over the Prevlaka peninsula.<sup>22</sup> Milošević’s attitude toward the Bosnian Serb leadership also evolved during the war, complicating attempts to evaluate his culpability. The Prosecution was able to prove that the VRS later committed crimes in Sarajevo, but by then Milošević and the FRY leadership disapproved of the entire Sarajevo campaign.



Milošević and others in the VSO thought the Bosnian Serbs' fixation on Sarajevo was a costly delusion; as he put it in December 1995:

Mladić said two days ago, "We won't give up what belongs to the Serbs, Sarajevo belongs to the Serbs!" Please, when have Serbs been a majority in Sarajevo during this century? When? Come on, let's see those facts! ... We achieved a great result. That's why anyone who calls it into question is either crazy or reckless or criminal, or he has some personal interest, could be war profiteering or something else.... We will not allow that!<sup>23</sup>

Milošević consistently urged the Bosnian Serbs to give up Sarajevo. In March 1993, he "told Radovan [Karadžić]... not to grasp for every bit of the Sarajevo province" but to focus on more important territory for the Serbs.<sup>24</sup> Later that year, he told Hrvoje Šarinić, envoy for Croatian President Tuđman, that he had proposed a secret meeting to Bosnian President Izetbegović, aimed at trading Serb-held land around Sarajevo for Bosnian-held territory in the Drina river valley on the Serbian border.<sup>25</sup> He was still advocating the same deal in August 1994, now more specifically: "the Serbs need Ozren [Mountain], Doboj, possibly Derventa, possibly some other places, which could be obtained very easily, in my opinion, in talks between the two sides and a trade for the vital areas the Muslims need to open up [Sarajevo's] access to Tuzla, to Zenica, to Mostar," which meant the Serb-held Sarajevo suburbs "Vogošća, Ilijaš and Hadžići."<sup>26</sup> In January 1995, he told Šarinić "the solution in BiH depends on Sarajevo," which "cannot be a Serb city" and should be traded to the Bosnians in return for territory elsewhere, this time around Banja Luka.<sup>27</sup> Months later, when Mladić asked him which Serb-held territories he proposed to surrender in exchange for peace, Milošević replied "I would give Vogošća and Ilijaš. [The Bosniaks] need a link with Sarajevo, Zenica and Tuzla."<sup>28</sup>

Far from being part of a JCE related to the siege of Sarajevo, the VSO was opposed to the siege. After the VRS shelled Sarajevo's Markale marketplace in August 1995, killing at least 35 people, Milošević demanded the Bosnian Serbs condemn in much stronger terms the "shelling of Sarajevo and the killing of innocent civilians" and quarreled with Mladić over the latter's denial of responsibility.<sup>29</sup> As the dominant figure in the VSO, Milošević—on the Prosecution's own theory of individual responsibility for institutional actions—could not be responsible for a position the VSO consistently opposed.



At the trial's midpoint, in its review of the Prosecution's case, the Chamber ordered all but one each of the enumerated incidents of shelling and sniping to be dropped; because of those single remaining incidents, all the counts related to the siege of Sarajevo were maintained.\*

### III. The Second Limb: Paramilitaries

*Mr. President, we are proud of the “unit” and the opportunity to serve our nation during a fateful time.*<sup>30</sup>

None of this implies that Milošević, or the Serbian and FRY state leadership, were wholly separated from criminality in Bosnia. Small Serbian forces, both regular VJ forces and paramilitaries, fought on and off, and both committed and facilitated serious crimes, in Croatia and Bosnia. Milošević's relationship to these paramilitary groups remains murky, and he may have chosen not to know the full extent of what was done to support and manage these irregulars by senior, trusted members of his Ministry of Internal Affairs.

With regards to Croatia, the *Milošević* Prosecution probably understated the extent of Serbia's control over, and responsibility for, events in the Serb-held areas of the RSK. Swapping members of the Croatian Serb government like a coach rotating his players, Milošević displayed a casual mastery that eluded him in Bosnia. After Croatian Serbs spent some of Serbia's aid on buying Second World War-era Chetnik-style headgear for its troops, Milošević exploded:

They're idiots, they want to look like Chetniks.... We've cleared that up with them, and that's why the Prime Minister is being fired! [Stojan] Španović, the Defense Minister they got rid of, has got to come back, and [RSK Prime Minister Zdravko] Zečević is going to fly. Because, we're not going to support Chetnikism! That much is clear. They will do all this immediately, if they want even to speak to us.<sup>31</sup>

Serbia's influence in the Croatian Krajina was pervasive, and nowhere more than in Eastern Slavonia, a lawless Serb-held region that hosted the paramilitary groups just mentioned. Thus a strong case could have been made for Milošević's control in the Krajina—stronger, indeed, than the Prosecution's case actually advanced.

Željko Ražnjatović, known as Arkan, was the most notorious paramilitary leader in former Yugoslavia. His *Srpska dobrovoljačka garda* (Serbian Volunteer Guard or SDG) or “Tigers” fought throughout the former Yugoslavia. Arkan reportedly boasted that “without orders from the DB, the state security, the Tigers were not deployed anywhere.”<sup>32</sup> The VSO devoted several meetings to the embarrassing problem of Serb paramilitaries, and during one of these sessions it turned out that Arkan was driving around Bosnia in an official vehicle belonging to the FRY Interior Ministry.<sup>33</sup> During that meeting and in others, Milošević consistently minimized the problem, denying the presence of any paramilitaries whatsoever in Serbia and claiming that “Arkan was a volunteer while the army was active on the battlefield, [he was] under military command,” not a freelancer.<sup>34</sup> Milošević also claimed that “absolutely no kind of [armed] formation could move” through Serbia, “without being arrested and disarmed.”<sup>35</sup> The others clearly disbelieved this—large groups of armed men were moving through Serbia and Montenegro on the way to and from Bosnia, stealing fuel, arming themselves, and staying over in VJ bases, clearly with the support of senior VJ officers.

Yet the evident links between the paramilitaries and elements within the VJ was not necessarily the same thing as active, conscious control from the top, as the Prosecution’s theory implied. For Montenegrin President Momir Bulatović, the VSO found itself like the sorcerer’s apprentice, beset by once-useful tools that had escaped from control and now threatened their former masters. “Let’s be honest, at one time we needed those paramilitary groups. Now they are real burden and a problem” and some of them had “switched camps, now they are some kind of army” for the far-right opposition leader Vojislav Šešelj.<sup>36</sup> Federal Minister of Internal Affairs Pavle Bulatović had the same diagnosis:

[C]ertain activities come back like a boomerang sooner or later; when the war was breaking out, and there was a poor response to mobilization, when the volunteer detachments would take whoever you wanted, whatever their mental or other personality traits, [and] over time they have become independent, established their own units, got out from under military command and separated from the ministry of internal affairs, now we have the problems that we have [in Bosnia, where] the Arkans, the Captain Dragans, some kind of “Mauzer[.]” four or five groups...the Serbian people are in danger from them, whether of theft, of rape, of arrest[.]<sup>\*</sup>

The discussion at this meeting may have been freer because of Milošević's absence; he had reacted badly when the issue had been raised before. Momir Bulatović hinted that important people still stood behind the paramilitaries: "If volunteers and some other paramilitary forces have to go to Bosnia and Herzegovina, out of some other plans and interest—I won't get into that—then let them go and good luck to them."<sup>37</sup> But they were causing problems in Montenegro and alarming the large Bosniak population of the Sandžak.

The issue arose again in February 1993. Dobrica Ćosić, President of the FRY, complained about private armies mobilizing in Serbia, heavily armed men "strolling through Belgrade," and quarreled with Milošević who, as always, denied there was anything to worry about:

ĆOSIĆ: "In the middle of Belgrade, Arkan has some kind of army that's guarding his house!"

MILOŠEVIĆ: "No. There was some kind of attempt, but they were all arrested. No one can guard a house with rifles."

ĆOSIĆ: "When did that happen?"

MILOŠEVIĆ: "It happened a couple of months ago."

ĆOSIĆ: "This happened ten days ago, there are people with revolvers here."

MILOŠEVIĆ: "If that's true, someone will be fired; that can't be allowed."<sup>38</sup>

The one who was fired turned out to be Ćosić, not whoever was responsible for dealing with the paramilitaries under Milošević's protection. Ćosić had apparently allowed himself to take his position as Yugoslav president and commander-in-chief of the VJ too seriously, and had made the unforgiveable error of challenging Milošević on his home turf. At a meeting of the VJ general staff on 27 May 1993, Ćosić alleged, in Milošević's words, that "the forces of the Ministry of Internal Affairs of Serbia [were] paramilitary formations, and I don't know what else."<sup>39</sup> By making this accusation, he had "attempt[ed] to manipulate the Army" and thus had to be removed from the Yugoslav presidency.<sup>40</sup>

Serbia's own paramilitary forces, and their role in backing others in the RS, disappeared from the VSO agenda with Ćosić. The paramilitaries



themselves remained throughout the war, as Milošević well knew. When he met with Mladić on 30 June 1995—days before the Srebrenica operation commenced—Mladić and Serbia’s state security chief Jovica Stanišić discussed using paramilitary troops based in Serb-held Eastern Slavonia. Stanišić offered “120 perfect men who would go there in seven days. These would be people from the eastern sector.” Another note indicated “we gave 80 from Erdut,” Arkan’s base in Eastern Slavonia, and “80 from Djeletovci,” the nearby home of the *Škorpioni*.<sup>41</sup> Mladić’s diary for the occasion refers to Mile Novaković and Mile Mrkšić, VJ generals who commanded forces in the RSK, which implies that at least some of these forces were meant for Croatia or the Bihać pocket, but members of the *Škorpioni* committed the video-recorded murder of several prisoners from Srebrenica in late July 1995.\* This tape is conclusive evidence that Serbian forces committed murder in Bosnia, yet it may not implicate Milošević in the Srebrenica genocide: It is not clear Milošević knew of the particular events in the video until much later.†

Milošević gave the paramilitaries the money and political cover they needed to operate, and he was close to their patron Jovica Stanišić. Paramilitary units fought all over Croatia and Bosnia. One of their leaders reported “47 soldiers were killed and 250 wounded in combat operations at 50 different locations.... 26 training camps for special police units of [RS] and the [RSK] were also formed in that period[,]” that is, from May 1991 to the end of the war in Bosnia. These units took part in “six large joint operations in eastern Slavonia, the corridor at Brčko, in the Drina, Sarajevo and Maglaj operations. In western Bosnia the unit was the backbone of Fikret Abdić’s army ... who freed most of Cazin Krajina[.]”‡ On one reading, this is damning: Milošević’s own police forces fighting in 50 locations, some of which are notorious. On another, it shows the tiny scale of his involvement: the ICTY estimates overall RS military fatalities at 15,298—hundreds of times higher than those of the Serbian paramilitaries.<sup>42</sup>

Milošević had few illusions about the goals of the Bosnian Serb leadership. Even if he had discounted the many horrible stories coming out of Bosnia during the summer of 1992, and even if his subordinates and clients hid the full scale of criminality from him, he could have heard it from RS leaders themselves. Bosnian Serb delegations were frequently in



Belgrade, often seeking financial or logistical help.<sup>§</sup> During one of these visits, for example, the RS prime minister made a startling suggestion, as related by Momir Bulatović:

Just a few days ago the Prime Minister of Republika Srpska talked to the Deputy Prime Minister of Montenegro. Those are just endless demands. It looks like they are just going from institution to institution and taking what they can; they are asking for some kind of weapons, I direct them to the Army of Yugoslavia. We have a duty to help them, but we also have to understand that it is hard to collaborate with someone who, like the Prime Minister of Republika Srpska, advises us to ethnically cleanse the Sandžak and kill the Muslims there.<sup>43</sup>

Milošević seemed to have been shocked by this, and later said “we have nothing to discuss with people like that.”<sup>44</sup> But Serbia’s support continued, as did the ethnic cleansing and killing in Bosnia.

## IV. The Spine: Milošević and Mladić

*I will not speak with Mladić any more. Because, after all we’ve done for them over these past several years, it would be a disgrace if they lied to us even about something less important! That would be dirty, shameful. And there’s nothing filthier than this! Therefore, I leave it to your collegial and military consciences—go ahead, gentlemen, if you can resolve this in any way whatsoever! I can’t get this kind of behavior in my head, I can’t understand it.*<sup>45</sup>

As he despaired of coercing the RS political leadership into agreeing to one of the international agreements that would free him from sanctions, Milošević tried splitting Mladić from them: In his diary, Mladić reported Milošević telling him that “the greatest threat looms from the crazy leadership in Pale. I have no animosity toward you.”<sup>46</sup> Openly contemptuous of Karadžić and the RS political elite, Milošević was warm and respectful to Mladić through 1994 and well after Srebrenica, only losing his patience in late 1995 over seemingly trivial issues.\* Others in the FRY leadership did not share his optimism; the rest of the VSO concluded Mladić was just as unreasonable and deluded as anyone in RS, as Perišić reported: “Ratko has, in many ways, entered a sphere of

unreality” and was operating on the “basic assumption that they had to win” completely, or perish.<sup>47</sup>

An unforeseen opportunity opened up on the first day of May 1995. The HV took control of the Serb-held UN protected area of Western Slavonia in Operation Flash; thousands of Serbs were fleeing, and panic was setting in. And so a little more than two months before he would order the troops under his command to murder the adult male population of the Srebrenica safe haven, Mladić placed an anxious phone call to Milošević.<sup>†</sup> Mladić spoke to Milošević respectfully, addressing him as “Mr. President,” and Milošević responded with avuncular warmth. There is a sense of familiarity and ease; in the audio recording, the tone is not one of a superior–subordinate relationship. Mladić asked for and got Milošević’s advice, not orders.

Milošević blamed the disaster on the politicians and the shoddy local military alike: “Unfortunately, Ratko... [RSK leader Milan] Martić did this on instructions from Radovan Karadžić.... you’re a soldier yourself and you know, Babić’s corps is up there and they ran like rabbits! Because, if [the HV] gets through 20 kilometers in 20 hours through a corps, that’s only possible when they’re fleeing like rabbits.”<sup>48</sup>

Mladić had other concerns and would not be tempted into a conversation about his political masters. His first request was to ask the international community “to protect this population and the army that’s surrounded, like they did with the Turks in the enclaves, Žepa, Srebrenica, Goražde and Sarajevo. Do you think that’s a good idea?”<sup>49</sup> (Over the coming days, the Serb press would fill with hysterical stories of mass murder of this trapped population in the UN protected area of Western Slavonia; there are reliable reports of scattered HV killings but overall casualties were in fact low.<sup>50</sup>) The connection Mladić drew here, between the fates of the trapped Serbs under ineffectual UN protection, and the Bosniaks of Srebrenica, is chilling. If Croatia could get away with what many Serbs believed was mass murder under the eyes of the UN, why couldn’t he?

Milošević assured him the Americans and Russians were involved and that the Croats were under enormous pressure. He urged Mladić to get involved in a scheme to press for a political solution: “If things don’t start moving toward a political solution, my estimate is that very bad things

will happen here. And I suggest to you, find the time for us to talk as soon as possible, to see what direction to work in.”<sup>51</sup>

Eventually, Milošević had had enough: “Unfortunately, Ratko, you have a completely crazy political leadership that is dragging you down to death.”<sup>52</sup> Mladić replied that he cared only about the people, “the people are suffering, what will we do with the people, I care about the people, I don’t care about the individual from whatever leadership over here”<sup>53</sup>—meaning, apparently, Karadžić. Milošević spoke in the language of states and their leaders, in which the people appear only as an abstract category; Mladić thought in a more basic and emotional register, where doing right by one’s own overruled all other considerations.

A few months later, on the eve of Srebrenica, Milošević tried again to persuade Mladić to support the latest international peace plan. The meeting became emotional; someone accused Mladić and the Bosnian Serbs, saying “you are in an uproar, you just keep shouting that you are a divine nation.”<sup>54</sup> Milošević must have sensed by now what kind of terms Mladić thought in, and tailored his attack to suit; he was uncharacteristically sentimental. “It is my conviction that not more than half of Bosnia belongs to us, if we get more, we are digging graves for our grandchildren. I don’t want our grandchildren to die in order to take what belongs to others ... let us defend what is ours.”<sup>55</sup> Given the suicide of Mladić’s daughter, the appeal to grandchildren seems meant to wound. Milošević pressed further, “I beg you in the name of God, it is a matter of our destiny—don’t think that I am not for the Serbian people, that I am a traitor and if you [do] think that, I’ll give you a pistol, kill me.”<sup>56</sup>

Srebrenica did not stop Milošević from making one more concerted effort to use Mladić against Karadžić. Once again, the HV provided an opening, conquering the RSK (apart from Eastern Slavonia) in less than a week in early August 1995. This was a true catastrophe for the Bosnian Serbs; it freed the Croats, and the powerful Bosnian 5th Corps, for operations aimed at the RS heartlands around Banja Luka. For the first time since the outbreak of war, the survival of the RS itself was in jeopardy. As VJ officers worried about whether the Croatian Serbs’ collapse had been caused by “psychotronic weapons,”\* Milošević began working on Mladić again. The idea was to secure Mladić’s agreement to sign on behalf of the Bosnian Serbs, with Milošević as chief negotiator.<sup>57</sup>



On 23 August 1995, the VSO summoned Mladić to a meeting and pressed him hard; Milošević explained that the international community would not deal with Karadžić any more and asked Mladić to guarantee that the VRS would honor a peace deal. In what the sober and bureaucratic summary of this meeting describes as a “fairly emotional” speech, Mladić insisted he was just a soldier and would not be drawn into politics, least of all against the RS political leaders.<sup>58</sup> Instead, he appealed to the VSO to host a summit meeting of the combined political and military leaderships of the RS and the FRY and, at that meeting, to adopt a common position. Milošević was cool to this and insisted on keeping Karadžić out; as proof of the latter’s unsuitability for serious discussion, Milošević read out a “secret letter” from Karadžić that blamed the FRY for the Serbs’ military reversals, and requested deployment of VJ troops on the “quieter fronts” while the VRS went on the offensive. He and the others appealed to Mladić to issue a public statement of just one sentence—“we accept peace”—and threatened to cut him and the Bosnian Serbs off completely. Mladić was not moved, and in the end, the VSO agreed to his demands. The summit meetings Mladić demanded took place later in August.<sup>59</sup>

## **A. The second scene: Srebrenica**

What role Milošević had in the capture of the Srebrenica safe area and the ensuing killings remains unclear. Primary documentation is lacking; neither the VSO materials nor Mladić’s diary records anything noteworthy about Milošević in those days, though the records are incomplete. The sole mention is a VSO conclusion, well after the actual events, taking the RS and RSK to task for “many errors” including “a reaction to provocations from Žepa and Srebrenica [that] gave justification to the West to prepare massive air force attacks.”<sup>60</sup>

About two weeks before the attack on Srebrenica, Milošević advised Mladić, “I would not touch the enclaves, they are islands which will run out” or expire.<sup>†</sup> Given the “catastrophic” situation within the enclave at the time, with the civilian population on the brink of starvation, this was callous.<sup>61</sup> And preparations for the assault on Srebrenica and Žepa had been under way for months, as Milošević must have known.<sup>\*</sup> Taking eventual possession of the enclaves would have made sense to him—he



had long before marked the Drina river valley as a key acquisition for the RS—but a spectacular escalation of criminality, and the ensuing damage to the Serbs’ international reputation, were inconsistent with his fundamental strategy.<sup>†</sup>

There remain tantalizing scraps of evidence, such as the visit of Milošević’s secret police chief to Pale on 9 July 1995.<sup>‡</sup> Wesley Clark testified that in August 1995, he had asked Milošević why he had allowed Ratko Mladić to kill so many people in Srebrenica, and that Milošević replied, “I warned Mladić not to do this, but he didn’t listen to me.”<sup>62</sup> In the absence of direct evidence, one is left with inferences and opinions. My own view is that Milošević must have known of the operation to take the eastern enclaves, but probably did not approve the mass killing.

After the close of the Prosecution’s case, the Trial Chamber held over all genocide charges for the Defense phase, but Judge Kwon found that “the furthest that a Trial Chamber could infer in relation to the *mens rea* requirement is the knowledge of the Accused that genocide was being committed..., but not the genocidal intent of the Accused himself.”<sup>63</sup> Given the exceptionally low standard of proof for this motion, Kwon’s dissent suggests a likely acquittal on these counts had the trial gone to judgment.<sup>§</sup>

## V. The Brain: Milošević’s Strategy

The *Milošević* trial’s evidence composes naturally into a mosaic image of the man at its center. Yet it was not the man the Prosecution set out to expose. His strategy, for all his famous secrecy, was simple and consistent. Milošević supported Serb control of about half of Bosnia, and if possible, a piece of Croatia, too. The Serbs seized this soon after the outbreak of war and thereafter, Milošević focused only on securing international approval through a peace plan. The issues that obsessed Karadžić and his cohort—ethnic purity, revenge for the Second World War, militant Islam, details of constitutional design, and degrees of sovereignty—did not matter to Milošević because he believed they would not matter much to the Serbs. The opinions of statesmen—the Clintons and Chiracs he

peppered his stories with, and whose peer he fancied himself—were all-important.

This attitude shows early on in Milošević's worries about the course plotted by Karadžić and the RS leadership. Their inexplicable deafness to international opinion upset him, not their war crimes. In December 1992, for example, Momir Bulatović wondered "what's the point of further military operations in Bosnia and Herzegovina?" Milošević replied, "They don't know either. Radovan told me he doesn't know why they took Jajce, a Muslim town there is no way they can retain. Why should even one man die for Jajce?" Čosić agreed: "That's right! And how many times have we advised them about Sarajevo?" The RS, Milošević believed, was making two errors: they were fighting for land "they will certainly have to give up, because there is no way it belongs to them, and second, they are squeezing the Muslims and beating them into a smaller area," which made them willing to fight on out of desperation and anger.<sup>64</sup>

The turning point came with the Vance-Owen peace plan. Milošević and the rest of the VSO thought it was an excellent deal for the Serbs. The RS Assembly's rejection of the plan (humiliatingly, after a personal appeal from Milošević) enraged him. From the spring of 1993 through the end of 1995, as the RS rejected every proffered peace initiative, Milošević's discussions of the errant Bosnian Serbs were consistent and sharply critical; he was, in effect, an advocate for peace against the Bosnian Serbs' policy of continued war.

Milošević's peace policy was in no apparent way motivated by aversion to war or sympathy with its largely Bosniak victims. His assessment was brutally realistic: A peace treaty would end the sanctions that were crippling his country, and would then eventually fail, allowing the RS to join Serbia. The key was obtaining international approval. Starting with the Vance-Owen talks, Milošević linked peace with lifting of the UN sanctions on his country, telling the mediators there would be "no implementation of the plan before the sanctions are lifted."<sup>65</sup> He made the same pitch months later to the Bosnian Serbs, arguing that their approval of the plan would block a second round of UN sanctions, while Croat-Bosniak conflict in Central Bosnia would scuttle the plan anyway.<sup>66</sup> Most bluntly, "if the sanctions are lifted, Greater Serbia is created."<sup>67</sup>

Milošević's belief in the transience of the peace plans extended to the Bosnian state structure they sought to erect. After the United States won Croatian and Bosnian acquiescence to the Washington Agreement, ending Croat–Bosniak fighting and anticipating a confederation between Croatia and Croat and Bosniak-held territories in Bosnia, Milošević sought the same deal for RS and the FRY. He claimed the Contact Group agreed: “they said, ‘all right, it’s completely clear, the Serbs have the same right to a confederation with Yugoslavia!’ People, that, then, is a single state.”<sup>68</sup> In private conversations, he could be even more explicit: “with Republika Srpska in Bosnia, which will sooner or later become part of Serbia, I have resolved ninety percent of Serbia’s national question[.]”<sup>69</sup> This was something like the Greater Serbia that the Prosecution claimed was Milošević’ goal, though achieved, not through aggressive war, but through peace plans.

As time passed, Milošević increasingly saw the succession of peace plans, and the international acceptance of RS they implied, as his achievement. He had kept the FRY safe from war and for the most part, kept its troops out of action; kept the RS afloat through years of combat and privation; and created an international consensus that, he believed, would lead sooner or later to a union of most Serbs in a single state.<sup>70</sup> The Bosnian Serbs’ stubborn, baffling failure to understand this infuriated him. Not only were they keeping his country under UN sanctions, they were also risking all he had achieved, and endangering their own state. By refusing “90 percent” of what they wanted in a hopeless attempt to get more, Karadžić and the RS leadership risked gambling it all away.\*

In their quest for more territory the Bosnian Serbs failed to understand certain basic features of their international position:

We told them more than a year ago, “half the territory [of Bosnia] is the maximum [you] can count on here.” It’s not even a question of whether they are militarily capable of taking more. Saddam Hussein took all of Kuwait militarily: no argument about that! Afterward he had to abandon all of Kuwait and have them beat on half of Iraq; and then [he had to] thank them for ceasing to destroy his country and thank them even for opening a dialogue with him.<sup>71</sup>

On another occasion Milošević explained that winning territory was meaningless because “if not a single great power wants to recognize it—you’ve got to give it back!”<sup>72</sup> And Milošević was sure that the RS could



retain no more than the Contact Group offered, or about half of Bosnia's territory.<sup>73</sup>

In some sense Milošević also believed the Bosnian Serbs' greed for more territory had led them to make unjust demands of their former Croat and Bosniak neighbors. He often dwelled on the percentages, as in an early meeting: "the Serbs, who are 32 percent of Bosnia, can't expect to get more than half of Bosnia, with less than half to be divided between the Muslims, who are 47 percent, and the Croats who are 17 percent.... I told Radovan to go for radical cuts, by which he could keep territory on the left bank of the Drina, the [Posavina] corridor and the Bosnian Krajina[.]"\* Readers accustomed to thinking of Milošević as the tormentor of Bosniaks and Croats may be surprised by this, and he certainly showed little affection or sympathy for non-Serbs. But, as he later noted, "we here [in Belgrade] who surely aren't cheering for the Turks, or the Ustaša...[and] as partial as we may be, absolutely cannot say that we deserve more than half of the territory of Bosnia and Herzegovina, where the Serbian people are only a third[.]"<sup>74</sup> The Bosnian Serbs' complaints about territory struck him as both unfair and shortsighted:

If you please, it is like this: the three of you have a loaf of bread on the table—let's say this ashtray here. You cut it in half, and you give one half to Perišić, or rather to the Serbs, while this other half goes to these other two colleagues of ours! And who complains about getting the short end—Perišić complains! And these two keep quiet, because they're reckoning that "since this guy is complaining, we will get the whole loaf."<sup>75</sup>

Even in his private conversations with Mladić recorded in the latter's diary, he made similar points. "Your key mistake," he told Mladić, "is to see a total defeat of the Muslims as the solution. That's not good, because they will be our neighbors, and we need good relations with our neighbors." Then he repeated his views on justice: "Understand, Ratko, this division is fair. The world won't accept a different division. The interests of all three peoples have to be taken into account. It is just for the Muslims and Croats to have fifty percent of Bosnia and Herzegovina."<sup>76</sup>

Finally, when the institutional complexities are stripped away—when the question of one man's individual criminal responsibility is at stake—what did the Prosecution say, and what did its evidence show? Approving military aid, administering the salaries of the VRS officer corps, tolerating



a subculture of lawless paramilitary thugs, haggling with the RS leadership over how much land to give up—all of this suggests complicity of a kind, but none is consistent with the Prosecution's preferred casting of Milošević in the leading role. The documentary record comprehensively disproves the Prosecution's central claim: that Milošević controlled the principal commanders of ethnic cleansing—that is, the Bosnian Serb military and political leadership. Nor is there evidence that Milošević planned the Bosnian Serbs' atrocities (as opposed to their political goals) with them, intended, or even approved of their commission, so charges based on JCE depend more on its formalist theory than on factual relationships. It seems likely Milošević had little to do with the indictment's headline counts—the terrorization of Sarajevo and the genocide at Srebrenica—which went against the grain of his strategy and came when his influence was at its lowest ebb.

Milošević's actions seem consistent with aiding and abetting Bosnian Serb crimes—but this theory of liability fits as uneasily into the context of international relations as it does into the ICTY's late jurisprudence. How much aid must a head of state approve before acquiring liability for the actions of its recipients? Once we answer this question, another appears: Can we accept assigning the lead actor in the political drama to a supporting criminal role? Is merely abetting a war crime too pale a shade with which to paint Milošević's likeness? Accessory to the murder of thousands and the expulsion of millions is in most contexts a grave charge; but one suspects it would have left the Prosecution and much of the public deeply unsatisfied.

## **VI. Conclusion: Possible Ways of Thinking about, and after, *Milošević***

*Therefore, I'm telling you all this so you will understand that when you are creating a state—Republika Srpska created on half the territory—you can't quibble about some particular place: "this quarter is Serb, so we should pull it out so it's on the other side." By quarters, by fields, by hills then they should say: "Where is Zvornik, where is Foča, where is Srebrenica, where is Bijeljina?" It's impossible to talk that way.<sup>77</sup>*

There is a curious similarity to the words Milošević used in speaking of unfortunate Bosniaks and Serbs outside Serbia's borders. The hapless Serb soldiers fleeing "like rabbits" from a Croatian Army advance merit his amused contempt; their leaders, on the other hand, get his rage. The thousands of Bosniak dead in and around Srebrenica are dismissed as "a reaction to provocations," while the detention of two French pilots provokes him to threats of war crime prosecution. References, by any party, to the justice of territorial claims—including the Bosniak claim that their clear majority in the Drina valley entitled them to sovereignty over it—was for him simply irrelevant: it is impossible to talk that way.

He was not emotionless; Milošević seems more committed to the Bosnian Serb cause than any of his VSO colleagues, and he did not try much to hide his anger with those who disagreed with him or failed him. Yet his reputation for chilly detachment was not baseless. The pleasures and sufferings—and deaths, in thousands—of people far from his Belgrade perch were distant abstractions that did not move him. The reality may be that Milošević simply stopped caring about what happened to the people outside Serbia's borders very early during the war. He kept material aid flowing to the Serbs in Bosnia and Croatia, and allowed notorious criminals such as Arkan to thrive under the protection of Serbian state institutions. There is also no doubt he tried to get the Bosnian Serbs the best deal he could in international peace talks. His record there consisted of more than two years of failure to dislodge the Bosnian Serbs from their self-destructive intransigence. Milošević's ultimate success at Dayton that was, in his own words, due as much to American force as it was to his own leadership.<sup>78</sup> But the decisions that led to the atrocities of the Croatian and Bosnian wars were made by others: by the Croatian Serb and Bosnian Serb leaderships, and by a great many anonymous men, enfranchised by war. The engineer of Greater Serbia presented by the Prosecution is largely a creature of fiction.

The inaccuracy of the Prosecution's core claim was not due to a lack of information, or faulty information: The Tribunal has amassed an extraordinary archive, and its dogged excavations of evidence, especially high-level government records that would otherwise have remained under embargo for decades, have allowed historians to reconstruct wartime events with great accuracy. Indeed, the Tribunal's great irony is that its

own evidence makes possible the revision and rejection of some of its headline factual claims.

The problem is, rather, that evidence viewed through the prosecutor's loupe takes on a distorted aspect; when the question one wants to answer concerns specific legal tests, devised in peacetime for very different situations, then much that is vital fades while minor details jump out in stark relief. And after the trial, few bother to dig into the evidence, while many more remember prosecutorial claims set out in indictments and in public statements.\* Sometimes this is corrected by the trial judgment, sometimes not. But where a trial ends without judgment the signature version of its truth remains the indictment.

So much for justice, and for truth; but what of peace, which was supposed to be one of the ICTY's purposes? It is now clear that the ICTY's initial peacemaking goals have been fulfilled beyond anyone's reasonable expectations. True, it failed to prevent some of the war's worst atrocities, and it failed to prevent a whole war in Kosovo. But it quickly removed all major war criminals from public life and left political leadership in the region to a new, relatively unblemished generation. It is hard to imagine Bosnia surviving if Karadžić had remained president of the RS. The VRS would hardly have agreed to dissolve itself into a common Bosnian armed force with Mladić or indeed anyone from his inner circle at its head. And without the ICTY, there would have been no ICTR and probably no ICC. Had the Security Council not acted to create the ICTY in 1993, the world today would be rather more hospitable than it remains for planners of atrocities.

These reflections compel a different counterfactual: What if Milošević's power actually had been as great as the Prosecution claimed? A man truly in control of the Bosnian Serbs could have compelled their acquiescence to the Contact Group plan in 1994:

We are practically being offered to enlarge our territory by a quarter ... and to enlarge our population by a tenth! And to legalize it. And even to guarantee a confederation immediately.... [T]hat secures us the right to defend those borders legally. The Iraq syndrome, of illegally encroaching on [foreign] territory, and suffering attacks for it, is lost. Therefore, we get the right to defend those borders legally, and at the same time, Russia has offered a military alliance, which would guarantee us arms and other goods and make possible a secure and stable defense of [our] territory, [and] the creation of a unified army that would be the strongest military actor in the Balkans.<sup>79</sup>

Peace in 1994 would have deprived Croatia of an excuse to retake the RSK. There would have been no Srebrenica massacre, no NATO bombing, probably no ICTY indictment for Milošević, but also quite possibly no viable Bosnian state, and no regional stability: A Bosnia composed of two entities, each in confederation with its more powerful neighbor—defended by their respective armies, with a thin Bosnian roof over them—could not have survived long.\* We owe the western Balkans as they are to the Bosnian Serbs' fatal overreach, and to Milošević—but not to his strength, rather his weakness.



## *Milošević and the Justice of Peace*

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*The indictment and prosecution of Milošević are a microcosm for studying the complex relationship between the ICTY's status as a judicial body and its mandate to promote peace in the Balkans. Although the ICTY can persuasively claim to have promoted the cause of peace, its experience provides at best ambivalent support for a universalized regime of criminal justice rooted in the neutral application of impartial legal norms by legal professionals. Instead, the Tribunal presents a study in contingency, highlighting both the importance of external events in giving life to the institution's mission and, more problematically, the critical role of prosecutorial discretion rooted in extralegal considerations.*

The ICTY is a judicial body. It is also an instrument of peace, established by the Security Council to safeguard international peace and security. What does it mean to occupy this dual role, and how should the broader goal of peace inform the Court's day-to-day execution of its judicial function? The question points to a tension in the ICTY's mandate that has defined the history of both that institution and the evolution of international criminal justice. It is a question that also stands at the center of Prelec's chapter.

For Prelec, the *Milošević* trial is evidence of an institution that has lost its way. With events on the ground having eclipsed its original mission to create and maintain peace, the Tribunal embarked upon a more elusive mission of “individualizing guilt [to] break[] cycles of collective recrimination and pave[] the way for reconciliation.”<sup>1</sup> Ironically, argues Prelec, the pursuit of these goals has led to their perversion, as the *Milošević* trial reveals the Prosecution’s commitment to a preconceived image of the “butcher of the Balkans” who masterminded the worst atrocities in the conflicts that accompanied the breakup of Yugoslavia in the 1990s. This preconceived Milošević has lingered in the public imagination of the trial notwithstanding the emergence of a detailed, if largely ignored, evidentiary record that paints a far more nuanced view of Serbia’s late president. The actual Milošević of Prelec’s narrative bears deep moral responsibility for the perpetration of great evils, but—at least with respect to atrocities committed during the wars in Croatia and Bosnia—his responsibility was neither as direct nor as readily translatable into the language of criminal guilt as is commonly thought.

Whether or not one endorses this account of Milošević’s responsibility, it is worth considering that, for Prelec, what originally drives the Tribunal’s turn toward narrative is the seemingly successful completion of the court’s original mission to facilitate peace.<sup>\*</sup> The years during which the ICTY has operated have seen dramatic and positive developments in the states of the former Yugoslavia. When the Tribunal was established, the region was at war; today, 18 years after Dayton ended the war in Bosnia, and more than a decade since the resolution of the conflicts in Kosovo and Macedonia, those states are at peace, despite intermittent turmoil. In Croatia and Serbia, the politics of aggressive, ethnic nationalism have given way to moderate governments focused on integration into European institutions rather than stoking ethnic tensions; Serbia, in particular, has managed to maintain this course notwithstanding Kosovo’s 2008 declaration of independence.<sup>†</sup> Despite ongoing constitutional crisis, Bosnia does not seem likely to revert to war. The prospect that the states of the former Yugoslavia may once again share a common border—that of the European Union—is a real one.

What role, if any, has the ICTY had in these developments? Prelec’s account of the evidentiary record starts with the establishment of peace in the Balkans: It was the realization of the Tribunal’s original goal that, in

his view, complicated its future work by forcing it to pursue other, more elusive rationales. Prelec thus takes the fact of peace as a given, without making assumptions about its causal relationship to the Tribunal, but the ICTY's relationship to peace is in fact a complicated one that deserves attention in its own right. On the one hand, the ICTY would appear to be a dramatic success story for those who argue that justice is necessary to peace. The Tribunal, of course, is not wholly or even principally responsible for the improved states of affairs in the former Yugoslavia, but it can credibly claim to have played a positive role in those developments.

At the same time, however, the Tribunal's success—such as it is—was, whether by accident or design, achieved in ways that are in tension with values many international lawyers hold dear. In particular, the Tribunal's history provides at best ambivalent support for the sort of institutional model that has figured prominently in the rhetoric of supporters and practitioners of ICL—namely, that of a universalized regime of criminal justice rooted in the neutral application of impartial legal norms by legal professionals.<sup>‡</sup> Instead, the ICTY's apparent contribution to peace presents a study in contingency, highlighting both the importance of external events in giving life to the institution's mission and, more problematically, the critical role of prosecutorial discretion rooted in extralegal considerations.

The indictment and prosecution of Milošević provide a microcosm of sorts for studying the ICTY's complex relationship to peace in the Balkans. Although the *Milošević* trial may have eventually served the cause of peace, that result was neither inevitable nor predictable given the trial's institutional context. A review of the ICTY's history points to deep tensions between the ideal of criminal justice and the court's peacemaking function; it also raises difficult questions about the extent to which prosecutors and judges at international tribunals should take account of their institutions' broader political impact in their decision-making process. Seen from this perspective, the difficulties Prelec examines may be less a departure from the Tribunal's peacemaking role than a manifestation of the tensions that role has created.

## **I. A Creature of the Security Council and the Law**



The pursuit of peace is a foundational goal of the ICTY. The Security Council resolution establishing the Tribunal placed special importance on this goal, stating the Council's conviction that "the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations international humanitarian law ... would contribute to the restoration and maintenance of peace."<sup>2</sup> That determination was, in fact, necessary to the Tribunal's legality, as the Council had no authority to establish a criminal tribunal except as a measure to "maintain or restore international peace and security" under its Chapter VII powers.<sup>3</sup> Thus, from its inception, the ICTY's legitimacy has hinged to an important degree on a link between criminal justice and the pursuit of peace.

The Council's assertion of that link was not free from controversy. In the ICTY's first case, *Tadić*, defense counsel argued that the Tribunal lacked jurisdiction because the establishment of a court was outside the permissible scope of Chapter VII.<sup>4</sup> The argument failed, and the court's Appeals Chamber ruled that it was for the Security Council to determine whether establishing an international criminal tribunal was in fact conducive to peace.<sup>5</sup> But in reaching that conclusion, the Chamber did assert one important qualification on the Council's power: It rejected the Prosecution's (and Trial Chamber's) position that, as a creation of the Security Council, the Tribunal lacked authority to assess the validity of its own creation.<sup>6</sup> Instead, the Chamber reasoned that the Council, in deciding how to secure international peace and security, specifically established "a special kind of subsidiary organ: a tribunal."<sup>7</sup> As such, the ICTY was possessed of the powers inherent in judicial bodies, including the power of *Kompetenz-Kompetenz*, allowing it to assess for itself the scope of its own authority.

Although in *Tadić* the Chamber focused on a specific question of jurisdiction, its reasoning also raises a broader question concerning the nature of the ICTY's role in promoting peace in the former Yugoslavia: To what extent does the Tribunal's judicial character allow it take specific cognizance of its peacekeeping mandate? May the Prosecutor and judges consciously consider, on a case-by-case basis, whether their decisions are likely to promote peace in the Balkans? Or must the Tribunal operate according to a more neutral set of context-independent criteria, taking as



given the Council's original determination that a judicial body—this particular judicial body—is in fact conducive to peace? In one form or another, this question has dogged the ICTY's operations from its establishment.

## **II. Prosecution without Peace**

The Tribunal's early years proved inauspicious for its pacific aspirations. With war continuing to rage in the Balkans, skeptics labeled the Tribunal a fig leaf, a symbolic effort designed to deliver the appearance of concern and commitment when in fact the world's powers were not yet prepared to undertake the military intervention that, some two years later, would decisively end hostilities.<sup>8</sup> With no way to reach the major perpetrators, most of whom remained in power, the ICTY's first cases focused on low-level suspects who happened to become entangled in the Tribunal's nets.\*

Notwithstanding the Security Council's determination that a tribunal would “contribute to ensuring” that violations of international humanitarian law would be “halted and effectively redressed,” there was always reason to doubt that the ICTY could actually promote peace in the Balkans through direct deterrence.<sup>9</sup> As Justice Jackson noted in his opening speech as Prosecutor at Nuremberg, deterrence is unlikely to prove significant “where the warmakers feel the chances of defeat to be negligible.”<sup>10</sup> One does not become a Milošević or a Karadžić without being willing to engage in high-risk behavior, and there are, of course, other risks associated with committing mass atrocities compared to which prosecution in The Hague is relatively attractive.<sup>11</sup> In any event, hopes of serious deterrence were quickly dashed as atrocities continued unabated: The massacre of some eight thousand Bosnian Muslims at Srebrenica occurred more than two years after the Security Council resolved to establish the Tribunal.<sup>12</sup>

## **III. Milošević as Peacemaker**

In light of these underwhelming beginnings, it is perhaps more appropriate to mark the conclusion of the Dayton Accords as the Tribunal's true beginnings, for it was then that the ICTY's contribution to peace became more plausible. But it was then, also, that the ICTY's relationship to peace became more problematic, raising tensions between the pursuit of peace and the maintenance of the Tribunal's judicial character highlighted by the *Tadić* Appeals Chamber.

According to one account—that of the first Prosecutor—the ICTY helped guarantee the success of Dayton. Four months before the presidents of Bosnia, Croatia, and Serbia negotiated a definitive conclusion of the Bosnia conflict, and shortly after the Srebrenica massacre, the then-ICTY prosecutor, Richard Goldstone, obtained indictments against Karadžić and Mladić for crimes against humanity and war crimes.<sup>13</sup> The Court then issued an additional indictment during the Dayton negotiations, focused specifically on Srebrenica and charging genocide in addition to the other offenses.<sup>14</sup> Goldstone has written that news of the impending peace talks led him to hasten the Srebrenica indictment,<sup>15</sup> and has assigned a broader political significance to the timing of the charges as a whole, arguing that “without the indictment of Dr. Karadzic and General Mladic, there would have been no Dayton Agreement.”<sup>16</sup> Goldstone's reasoning emphasizes that the indictment led to the exclusion of Karadžić from the Dayton negotiations.\* This exclusion, according to Goldstone, facilitated the success of those talks because, as confirmed to him by Bosnia's former foreign minister, “had Dr. Karadzic been free to go to Dayton, the Bosnian government would not, in the aftermath of Srebrenica, have attended the Dayton proceedings.”<sup>17</sup> Thus, by marginalizing the two most notorious Bosnian Serbs, the indictments secured a negotiating environment that was conducive to agreement.

Although it is reasonable to assume that the possibility of prosecution—of Karadžić and Mladić specifically, but also of others—made concessions more palatable to Bosnia's government, including the recognition of a Bosnian Serb entity on territory ethnically cleansed of Muslims and Croats, there is also reason to be skeptical about Goldstone's logic. It was in the United States' interest to marginalize the Bosnian Serb leadership irrespective of any indictment.<sup>18</sup> As Bassiouni also discusses, the United States preferred to deal directly with Milošević, who

manifested a greater commitment to the peace process and who, on account of his own enormous leverage over Bosnian Serb affairs, could reliably be held accountable for ensuring Dayton's enforcement. Even before the indictment of Karadžić and Mladić, U.S. officials had abandoned negotiations with the Bosnian Serb leadership; the late Richard Holbrooke, who served as chief U.S. negotiator at Dayton, believed those talks had proven "dangerously unproductive" and the experience led him to endorse a "strategy of negotiating solely with Milosevic."<sup>19</sup> "While we did not want to elevate Milosevic to statesman status," Holbrooke elaborates, "we planned to negotiate only with him and, at the same time, hold him strictly accountable for the behavior of the Bosnian Serbs."<sup>20</sup> For similar reasons, it was Croatia's President Tuđman, rather than the local Bosnian Croat leadership, who participated as the Croat counterpart to Milošević and Izetbegović.<sup>21</sup>

Goldstone's account is nevertheless remarkable for what it implies about the relationship between international justice and peace. Taken at face value, the account is troubling for a pure judicial model of international justice that promotes peace simply through the ordinary and neutral application of the law. Instead, it points to a highly contingent success, one dependent upon some combination of prosecutorial strategy and serendipity. The fact that Karadžić and Mladić were widely blamed for systematic atrocities is not unrelated to their being an impediment to peace—surely the Bosnian government would have had less trouble negotiating with leaders who had committed themselves to the politics of tolerance rather than to ethnic cleansing. Yet neither is the claimed utility of their indictment reducible to a question of their guilt or innocence. Although Goldstone does not say it, the very argument he invokes to justify the *Karadžić* and *Mladić* indictments also renders it highly convenient that, by the time the Dayton negotiations started, the ICTY had not yet indicted Milošević for participation in the very same crimes of which it accused Karadžić and Mladić—even though, a few years later, the Prosecution did exactly that. By 1995, Milošević had—deservedly or not—long cemented his reputation as the "butcher of the Balkans," but the logic of Dayton necessitated some rehabilitation of the Serbian leader as a critical guarantor of peace in Bosnia. Goldstone's argument, in other



words, reveals no necessary relationship between criminal guilt and the frustration of peace.\*

Concern that Milošević might be exempted from prosecution only deepened as the next four years failed to produce an indictment against the Serbian leader. Perhaps not coincidentally, the years immediately following Dayton were the period in which the ICTY could most plausibly claim a role in facilitating peace. With NATO troops deployed on the ground to buttress a political settlement rooted in power sharing between Bosnia's ethnic groups, transfer to the ICTY provided a convenient means of incapacitating many of those most hostile to the international effort.<sup>22</sup> Some, like Karadžić and Mladić, evaded capture but found themselves driven into hiding and evicted from power as Bosnian Serb politics moved in a more moderate direction.<sup>†</sup> For one scholar, these developments evidenced a "new realism" about international justice, one rooted in the realization that "the removal of leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to postconflict peace building," and that "[i]n concert with other policy measures, resort to international criminal tribunals can play a significant role in discrediting and containing destabilizing political forces."<sup>23</sup>

One could tell a similar story about Milošević's incapacitation a few years later,<sup>24</sup> but it's worth asking if this optimistic narrative would have remained plausible had the Tribunal moved against the Serbian leader in the early years of Bosnian peace, or even during the war, when Milošević was at the height of his power and was thought indispensable to a settlement. In this respect, Prelec's account suggests an apolitical explanation for the Prosecution's six-year delay in bringing charges: The evidence tying Milošević to crimes in Bosnia and Croatia was simply not there. At the same time, it remains unclear how committed the ICTY actually was to developing its case and amassing the evidence necessary to support an indictment.\*

In her memoir and her chapter, former chief prosecutor Del Ponte recalls being surprised upon her arrival at the Tribunal by the weakness of the Prosecution's evidence against Milošević for crimes in Bosnia and Croatia.<sup>25</sup> Yet, even though by that time Milošević had already been indicted for crimes in Kosovo, Del Ponte found her senior staff reluctant to invest significant time and resources, preferring instead to focus on



those cases that, in their view, had a realistic chance of coming trial.<sup>26</sup> If not evidence of overt *Realpolitik*, this account suggests that the ICTY's work may have been informed by what we might call a prosecutorial meta-*Realpolitik*—a pragmatic inclination to focus on suspects whose prosecution is more likely on account of the political priorities of states best situated to effect arrest.

## IV. Indictment and Transfer: Calculating the Consequences of Guilt and Innocence

By the time Del Ponte's predecessor, Louise Arbour, announced the indictment of Milošević for atrocities in Kosovo, NATO powers had already turned against their erstwhile partner-for-peace in Bosnia. There was no question here of coincidental timing, as there had been at Dayton: As NATO aircraft conducted their almost three-month-long bombing campaign over Serbia, Arbour rushed the indictment in an effort to influence ongoing peace efforts.<sup>†</sup> In this case, however, the purpose was not to facilitate international efforts but to ensure that NATO's military operation did not interfere with criminal prosecution of Serbia's leadership. "I was in a hurry" Arbour explained, "I thought we might miss out as peace was being discussed. I thought [Milošević] might be able to negotiate a deal for his departure."<sup>27</sup>

Although, from an internal institutional perspective, one might defend Arbour's approach simply as an effort to ensure that the Tribunal could do its work, in effect the Prosecution was openly wielding indictment as a means of mobilizing pressure against any peace deal that included immunity, even if immunity was the price of agreement on some other substantive terms, or was the price of securing a deal at all. This might seem in tension with the ICTY's origins as an instrument of international peace and security, but Arbour directly justified her strategy by reference to that mandate, maintaining in her formal announcement of the indictment that "the product of our work will make a major contribution to a lasting peace, not only in Kosovo, but in the whole region in which we have jurisdiction."<sup>28</sup>

Why should this be so? Arbour offered two answers, both involving empirical assessments that transcend evaluations of criminal guilt and innocence. First, she argued as a general matter that “no credible, lasting peace can be built upon impunity and injustice.”<sup>29</sup> Second, she made a more specific claim about Milošević himself and his co-indictees: that “the evidence upon which this indictment was confirmed raises serious questions about their suitability to be the guarantors of any deal, let alone a peace agreement.”<sup>30</sup> The Tribunal’s job, in other words, was to help secure a more robust, sustainable peace in the Balkans, one rooted on the Prosecutor’s own assessment of the political situation, and one that might defy the judgment of the very Security Council powers who had established the ICTY as a peacemaking instrument, or of the powers currently prosecuting the war or negotiating with Belgrade.

In hindsight, the historical record reflects favorably on Arbour’s decision. At the time, some NATO governments feared that an indictment would prove an impediment to peace.<sup>\*</sup> That did not happen, but any direct impact on the Kosovo conflict is hard to assess: The most that can be said is that the *Milošević* indictment did not prevent a negotiated end to the war, nor did it obstruct the subsequent settlement placing Kosovo under international protection and governance without resolving the territory’s ultimate political status.<sup>31</sup> Yet the fact that Milošević agreed to these terms without insisting on a formal amnesty is surely a reflection of the indictment’s weakness rather than its strength. At the time the agreement was made, NATO powers were unlikely to secure his arrest by force, and the domestic Yugoslav authorities would not enforce the indictment so long as Milošević maintained power.

The true utility of the indictment revealed itself in the following years, after mass protests in September and October 2000 frustrated Milošević’s attempt to steal the presidential election won by Vojislav Koštunica. Against the backdrop of Milošević’s political ouster, his transfer to the Tribunal the following June can credibly be said to have served a similar incapacitating function as the *Karadžić* and *Mladić* indictments had done at Dayton. As Serbian politics embarked on a path of relative moderation—one that in recent years has peacefully survived the assassination of a prime minister and Kosovo’s secession—the leader who had presided over 10 years of ethnic extremism, war, and international isolation was safely

locked away, his influence limited to the public forum of his televised courtroom.<sup>†</sup>

## **V. *Milošević* and the Pitfalls of Pursuing Peace through International Trials**

We return now to Prelec's penetrating analysis of prosecutorial overreach in *Milošević*. Although, as Prelec sees it, the trial may have lost its way in pursuit of such elusive goals as documenting the truth, channeling victims' voices, and individualizing guilt, these shortcomings are perhaps best viewed not as a departure from the Tribunal's mission but as yet another manifestation of the ICTY's troubled relationship to peace. Historically, advocates of international justice as an instrument of peace have not aimed solely or even primarily at the immediate cessation of hostilities. Their aspirations have focused more broadly on fostering the "credible, lasting peace" identified by Arbour.<sup>32</sup> Seen from this perspective, an international criminal trial is focused as much on catalyzing social transformation outside the courtroom as it is on establishing the criminal guilt or innocence of the accused. Can we credibly expect that these trials will provoke a broader coming to terms with past criminality, foster social reconciliation, and even—as Justice Jackson put it at Nuremburg—"stay the hand of vengeance[?]"<sup>33</sup>

As the contributions to this volume attest, the jury is very much out with respect to the ICTY's ultimate impact on the peoples of the former Yugoslavia. The more salient question, however, focuses on what sort of commitments these sweeping aspirations entail. It is a question of institutional design: Can social transformation result from the neutral application of legal rules according to a forensic judicial conception of the ICTY's functions, or must the Tribunal in its day-to-day decision making actively seek to produce whatever narrative or political impact is best calculated to serve its broader goals?

The ICTY has faced a number of choices whose outcomes bear on the reception of the Tribunal's work outside the courtroom: the selection of individual suspects, the balance of ethnic and political affiliations represented by the accused, the specific charges pursued, and the sentences



imposed, to name but a few. To take one example discussed elsewhere in this book, public opinion polls taken in the states of the former Yugoslavia have repeatedly reported perceptions that the ICTY is biased against the members of the respondents' respective national groups.<sup>\*</sup> Although some respondents may believe that the Court has convicted innocent individuals, such sentiments are no doubt also motivated by broader historical concerns: Many Serbs believe that the Tribunal has targeted too high a portion of Serb suspects; by the same token, many Croats and Bosniaks object to what they see as excessive prosecutions of their co-nationals that risks equating victim and aggressor.<sup>34</sup> Seen from this perspective and to the degree the Tribunal's goals include some effect on peace and stability, the Tribunal's success hinges not merely on establishing individual guilt or innocence, but on doing so in way that supports a broader political and historical narrative conducive to the sort of political transformation the ICTY hopes to achieve.<sup>†</sup> This implies an unavoidably dualistic project of institutional design that attends both to forensic judicial values and to their impact, which is social and political.

Seen against this backdrop, the flaws Prelec identifies in the *Milošević* trial are in fact emblematic of the pitfalls inherent in the broader project of ICL. If the point of tribunals such as the ICTY is to promote peace through selective, even tokenistic, trials of highly symbolic figures such as Slobodan Milošević, then it is reasonable to suppose that the quality of that peace could be affected by the breadth of the charges pursued, or by the broader historical narrative the trial imparts. One problem, as Prelec points out, is that the evidentiary record does not always cooperate with these designs. And where history does reveal deep moral guilt, it does not always do so in ways that conform to the language of the criminal law.



## PART FIVE

### Disposing of the Body

The effects of international criminal law are as disputed as its purposes, processes, and decisions. The chapters in this section return the discussion to the broader social and political impact of the *Milošević* trial and the ICTY, here with a focus on Serbia—the society which, though not the focus of his alleged crimes, was the one to which the most expectations and hopes for his trial were attached. Is transformation by trial an achievable purpose? On what does it depend? What have international and local elites used the trial and Tribunal to achieve in their domestic politics?

## The Parting of Ways

Public Reckoning with the Recent Past in Post-Milošević Serbia

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*Critics point to defects in the trial process, or to the persistence of nationalism, as reasons for the limited transformative impact of the Milošević trial in Serbia. However, the role of memory and different understandings of how to confront the past have been equally important in shaping responses to the Tribunal. These factors are explored in this chapter by examining a debate the Milošević trial generated within Serbia's liberal intelligentsia: The 2002 Vreme debate exposed the existence of two alternative narratives of the Serb experience of the wars of the 1990s, two approaches to the question of responsibility for the crimes committed in those wars, and two deeply opposed visions of the role played by the West in Serbia's democratic transition. The Vreme debate offers important insights into why the impact of courts in transitional societies is not as straightforward as their advocates might hope.*

# **I. Unmet Expectations, Alternate Narratives—The *Vreme* Debate**

Since the Nuremberg Tribunal, international trials have included goals of societal education and transformation alongside their formally defined purpose of trying individuals for specific crimes. International criminal tribunals are seen as vehicles to establish a historical record, counter forgetting and denial of crimes, and ultimately promote reconciliation.<sup>1</sup> In the eyes of its practitioners and its advocates, the ICTY has had the task of promoting just such wider collective aims in the post-Yugoslav region. As a 2008 report on the impact of the ICTY in Serbia noted, many supporters of the Tribunal “believe that one of the most important benchmarks for [it] is educating the Serbian public about atrocities—especially about crimes committed by their political leaders.”<sup>2</sup>

Of all the trials conducted by the ICTY so far, the *Milošević* trial undoubtedly embodied the greatest expectations in this regard. In her opening statement, Chief Prosecutor Del Ponte described the trial as marking “a turning point of this institution” and possibly “the most significant trial that [it] will ever undertake.”<sup>3</sup> According to Del Ponte, this trial—more than any other—would contribute to writing the history of Yugoslavia’s violent disintegration and “fratricidal conflicts”<sup>4</sup> and play an instrumental role in promoting a reckoning with the recent past and reconciliation in the region. Serbia, whose former leader was being prosecuted and whose role in the wars was generally seen as the most important, was clearly at the heart of this process.

These expectations were not met. Milošević’s death before the conclusion of the proceedings represented a tremendous blow to the Tribunal, but it was clear already from the beginning of the trial that the Tribunal’s pedagogical aims were going to be very difficult to fulfil. Although the trial was transmitted live on state television and sparked tremendous public interest, the effect was in fact the contrary of what had been hoped by the Tribunal’s advocates. Rather than discrediting Milošević and unequivocally exposing his guilt, the trial actually improved his standing with the Serbian public.\* Although subsequently the ICTY Prosecution did present significant evidence linking Serb paramilitaries and the Milošević regime to atrocities committed in Croatia

and Bosnia and thus countered denial of Serbia's complicity in these crimes, it remained largely unsuccessful in persuading the Serbian public of its own version of the truth about the wars of the 1990s.<sup>†</sup>

Two types of reasons for the undesired effects of the *Milošević* trial can be found in the literature: defects of the trial itself and the pervasiveness of nationalism in Serbia. Legal critiques of the trial have focused on the failings of the Prosecution, notably its joining of the three indictments, imputing too much to Milošević and attributing too great a weight to his Greater Serbia policy. This made the trial an unwieldy marathon in which the Prosecution's case alone took three years and produced an indigestible 1.2 million pages, compromising both its own ability to prove all its counts and Milošević's ability to defend himself.<sup>‡</sup> The literature also highlights problems with the Prosecution's choice of witnesses, its apparently insufficient knowledge of Serbia and its history, and its decision to begin with the Kosovo indictment—all of which played into the defendant's hands.\*

The second explanation, emanating from political science perspectives, attributes the ICTY's lack of success in promoting its pedagogical mission primarily to domestic factors, notably enduring nationalism in Serbia. This literature emphasizes the continuities between the Milošević regime and Serbia's post-2000 leadership in terms of both goals and rhetoric, ascribing the ICTY's lack of impact on Serbian society to "the continued prominence of illiberal, chauvinistic nationalism in Serbia."<sup>†</sup> It is illusory, from this perspective, to expect the ICTY to have a transformative impact as long as this is the case; only when domestic elites genuinely embrace the process of confronting the past can a society become more receptive to the liberal human rights message of international courts.

Both these arguments contribute to our understanding of why the ICTY has had problems reaching its audience in Serbia, both generally and more specifically during the *Milošević* trial. However, there are other reasons for the limited pedagogical or transformative impact international tribunals such as the ICTY have in post-conflict societies. Notably, the role of memory—particularly memory of directly experienced trauma—is an important factor shaping responses to judicial proceedings against former leaders. Indictments, arrests and, above all, trials represent grand



public spectacles that can act as triggers for “irruptions of memory” of a political past that still constitutes an important part of the lived experience of a population.<sup>5</sup> Evocations of such memory can take different symbolic forms and incorporate different commemorative practices, but, most important, they are articulated in the course of intense public debate as contending narratives about this past: what really happened, why events took the course they did, and who was responsible. As an examination of the debate that arose in the course of 2002 in the pages of the news weekly *Vreme* shows, this is in fact what happened in the case of the *Milošević* trial.

The debate in *Vreme*, one of the main organs of the Serbian liberal intelligentsia, provides a useful lens through which to examine the impact of the *Milošević* trial in Serbia, precisely because it pitted members of the former antinationalist and antiwar civic opposition—the self-designated *Druga Srbija* (Other Serbia) group—against each other. These were not people who had believed Milošević’s propaganda or endorsed his nationalist ideology and goals. Indeed, they were keen to see accountability for the crimes perpetrated in the wars of the 1990s and thus should have been the Tribunal’s natural allies within Serbia.<sup>‡</sup> In a multitude of ways, from independent investigation of crimes to the organization of public demonstrations, this loose coalition of individuals associated with NGOs, independent media outlets, and various intellectual groupings had in the course of the 1990s built up a publicly available record and created a foundation for future examinations of the legacy of the Milošević years. Some of them even contributed to judicial processes through their own testimony or by supplying evidence.<sup>\*</sup> However, rather than representing a united force supporting the Tribunal and its prosecution of Milošević, this group effectively split over questions about Serbia’s recent past that were generated by the trial.

The significance of the *Vreme* debate was clearly understood at the time. As one perceptive commentator noted:

There are at least two reasons why this polemic about responsibility for war crimes on the pages of *Vreme* can be considered an important social and political happening, even one of extraordinary public interest. One is certainly the fact that this is the first public debate here in which many well-known individuals are trying to define their personal and also collective approach to the crimes perpetrated by the Serb side in the recent past. Until now, there was reluctance to broach this theme.... This polemic has also

attracted attention for another reason. The confrontation, accompanied by deep differences in visions of the recent war crimes, is taking place among people who were until now verifiable members of the democratic—in other words, anti-Milošević and anti-war—bloc in Serbia....†

The *Vreme* debate led to the public articulation within the liberal intelligentsia of two alternative narratives of the Serb experience of the wars of the 1990s, two different approaches to the question of responsibility for the crimes committed in those wars, and two deeply opposed visions of the role played by the West both before 2000 and during Serbia's democratic transition—all of which have lasted to this day. Neither the defects of the *Milošević* trial nor lingering nationalism provide us with a satisfactory explanation for the deeply divergent standpoints that emerged during the *Vreme* debate on questions concerning the recent past—questions that split the *Druga Srbija* group and provoked such intense emotional fallout among its members. Rather, the debate revealed that the underlying source of the discord among Serbia's liberal intelligentsia resided in the deeply divisive experience of the 1999 NATO intervention against Serbia—the memory of which was triggered by the onset of the *Milošević* trial.

## II. The Context and the Onset of the Debate

The *Vreme* debate took place in the context of considerable political and public hostility toward the ICTY, some six months into the *Milošević* trial. It followed a year of intense pressure by Western governments, particularly the United States, for Serbia to cooperate with the ICTY by extraditing individuals to The Hague.<sup>6</sup> As Pešić explains, this external pressure and the conditioning of vital economic aid to Serbia on such cooperation contributed to the rift within the already fractious DOS coalition that had defeated Milošević in 2000. In particular, it exposed a conflict between Serbia's prime minister Zoran Đinđić, who championed the position that Serbia had to accept such demands in order to achieve economic recovery and a rapprochement with the West, and Yugoslavia's federal president Vojislav Koštunica, who argued that cooperation with the ICTY was not a priority and had to be undertaken only within the

framework of incremental legal change, such as the adoption of an extradition law. When it became clear that the federal Parliament and Supreme Court, populated by remnants of the old regime, were not going to enact the legal formalities in time for the deadline set by the United States before an important donors' conference, Đinđić invoked a provision in the Serbian constitution allowing him to engineer an eleventh-hour handover of Milošević to a U.S. base in Bosnia, from which he was then transported to The Hague. Although the transfer did not provoke an immediate backlash in Serbia, it did mark the disintegration of the DOS coalition, a growing opposition to Đinđić among Serbia's compromised security forces concerned about their own possible transfer to The Hague, and a sense among the population that Serbia simply had no choice but to give in to what was perceived as blackmail by the West.\*

Popular perceptions of the ICTY also became increasingly negative following the onset of the *Milošević* trial. The periodic opinion polls taken by the Belgrade Centre for Human Rights showed that the number of those with a positive view of the ICTY had fallen from 30 to 25 percent and the number of those who believed that individuals should be tried by the ICTY as opposed to domestic courts fell by a similar number, thus concluding that as opinions of the ICTY became more fixed (indicated by fewer "don't know" answers) so did negative assessments of it.<sup>7</sup> Questions specifically related to Milošević's transfer and trial showed similar trends: in 2002 the number of those who believed Milošević should not have been transferred rose from 44 to 62 percent, whereas those who approved fell from 43 to 27 percent. Finally, respondents gave the performance of the Prosecution and the chances of Milošević getting a fair trial the poorest marks, whereas Milošević's self-defense received the highest mark. The trial was, if anything, discrediting the ICTY rather than Milošević in the eyes of Serbs.

It is in this context that in August 2002 an article appeared in the independent Zagreb weekly *Feral Tribune* by the well-known Serbian political commentator and satirist Petar Luković. Luković alleged that post-Milošević Serbia was not fundamentally different from its predecessor and that it was actively engaged in promoting a "collective amnesia" toward the recent past, neglecting the fundamental questions of war crimes and the Hague Tribunal.<sup>8</sup> For him, the blame for this sorry state of affairs lay not only with the new political leadership, but also with



the liberal intelligentsia, whose most important media outlets—the weekly *Vreme* and the radio–television station B-92—were in his view giving “obscure fascists and chauvinists” space to regularly air their views in public and collaborating with the political powers in their refusal to confront the crimes of the Milošević era.<sup>9</sup> The article was accompanied by an interview with Sonja Biserko, the director of the Serbian Helsinki Committee, who agreed with this view:

There are two problems that we encounter almost daily: one is the generalization and relativization of crimes and the other is the attitude towards the Hague Tribunal. As the crimes are becoming ever more apparent and as the evidence is increasingly accessible, Serbian society, or to be precise, its elites, are trying in an ever more organized way not just to relativize but to de-ethnicize the crime. The way in which the new truth is being presented—especially through the so-called independent media, like B-92 or *Vreme*—is as totalitarian as the nationalism that once started the war machinery.<sup>10</sup>

The reactions to these claims were instantaneous. Veran Matić, the director of B-92, responded in a letter to the editors of *Feral Tribune*.<sup>11</sup> He denied Luković’s allegations, highlighting B-92’s continued live transmission of the *Milošević* trial (even after state television had stopped) and listing its numerous other programs dealing with the recent past, including 66 documentaries focused on the wars and specific crimes shown as part of a prime-time series on “Truth, Responsibility and Reconciliation.”<sup>\*</sup> However, Matić agreed that life did go on in Serbia and that it was true that the crimes of the Milošević era were not foremost in people’s minds, asking whether “insensitivity and forgetting were a part of human nature or a special Serb invention[;]” in his view, “the demand that life has to stop until the graves are exhumed is simply crazy.”<sup>12</sup> He also rejected Biserko’s accusation of “totalitarianism,” noting that in the process of confronting the recent past, B-92 was trying to be as all-encompassing as possible. He agreed that criminals and warmongers should not be “amnestied,” but he also rejected the idea that memory should be “selective,” something he believed his critics were guilty of.<sup>13</sup>

The reaction of the editor-in-chief of *Vreme*, Dragoljub Žarković, was even stronger. Quoting Biserko’s interview in his weekly editorial column, he replied that none of the accusations were true except one—that *Vreme* indeed sought to de-ethnicize the crimes of the Milošević regime: “We work under the assumption that criminals have first and last names and



that any approach that seeks to accuse an entire nation of crimes is itself totalitarian.”<sup>14</sup> Žarković also reminded his readers that Biserko had called for the de-Nazification of Serbia during the NATO bombing; by making these kinds of statements, he argued, Biserko was actually endorsing the extreme nationalists’ slogan that, along with Milošević, the Serbian nation as a whole was on trial in The Hague. This was the reason, in his view, for the public disgust with the NGO of which Biserko was the director.<sup>15</sup>

This acerbic exchange immediately highlighted the main lines of the debate that ensued over the next four months: first, the question of whether the liberal media were minimizing Serb crimes in the way they were reporting on the ICTY and thus contributing to political and public resistance to processes of justice and facing the past; second, the issue of whether acknowledgement of the past in Serbia needed to be focused only on crimes perpetrated by Serbs, or whether it should also include consideration of crimes committed by others against Serbs; and, third, the problem of whether it was possible and indeed productive to frame the discussion in terms of Serbs’ collective responsibility for crimes perpetrated by their former regime. Finally, Žarković’s point about Biserko’s declarations during the NATO bombing campaign brought to the fore the underlying trauma that fueled this discord: the 1999 NATO military intervention against Serbia, nominally undertaken to defend the liberal values that the Belgrade opposition had been fighting for and with which it identified.

### **III. The First Strand of the Debate: Reporting the Milošević Trial and the Role of the Media**

The critique first provided by Luković and Biserko was taken up by a group of intellectuals—whom we shall call “the critics of *Vreme*” for the sake of clarity—which included among others the lawyers Srđa Popović, one of the founders of *Vreme*, and Nataša Kandić, the director of the Humanitarian Law Centre, along with the filmmaker Lazar Stojanović, the philologist Svetlana Slapšak, and the historian and former politician Latinka Perović. As Kandić put it, Serbia’s independent media were forging public opinion in the same way as the old regime had done, by

reporting on Milošević's trial as if it were a sports event, in which they were openly rooting for one side—Milošević.<sup>16</sup> Instead of reinforcing the ICTY's educational mission and unmasking Milošević's tactics as a “disgusting farce for domestic consumption[,]” reporters were relaying and applauding Milošević's cynical cross-examination of witnesses.<sup>17</sup> For this group, the ICTY was the single most important mechanism for Serbia's confrontation with the past, and it was the country's prime national interest to cooperate with it. However, as Srđa Popović noted, the pact concluded by Serbia's new political leadership and important elements of the Milošević apparatus—which had abandoned their former leader in return for promises that they would not be handed over to the ICTY—was preventing any real change in Serbia and hampering cooperation with the Tribunal.<sup>18</sup> In the view of the critics of *Vreme*, instead of explaining the judicial process taking place at the ICTY and justifying its purpose to the Serb public, the independent media had contributed to the Tribunal's delegitimation and the “organized oblivion” of the crimes that it was prosecuting.<sup>19</sup>

Countering this view, participants on the other side of the debate—whom we shall refer to as “the defenders of *Vreme*”—argued that the reasons for the ICTY's illegitimacy and unpopularity in Serbia lay with the Tribunal and its Prosecution, not with the Serbian media or political authorities. Stojan Cerović, a well-known columnist and another of *Vreme's* founders, noted that most Serbs were forging their views of the *Milošević* trial from the daily televised transmission of the court proceedings, not from reports in the written press. So, if the message about Milošević's guilt was not getting through, then “the problem resides with that court and/or its Prosecution.”<sup>20</sup> Citing several American and British reports, the journalist Ljiljana Smajlović noted that Serbian media were not alone in their criticisms of the way the Prosecution was conducting the *Milošević* trial:

I understand the frustration of the human rights activists because the Hague trial of Slobodan Milošević is not going the way they hoped and is not having the effect they expected. But journalists are just reporters; they are not responsible for the mistakes of the Prosecution, the cynicism of the Accused and the lack of truthfulness of the witnesses.\*

Thus what to the critics of *Vreme* sounded like a defense of the former regime—criticisms of the witnesses and prosecutorial strategies—were to this side simply exercises in objective journalism. Several participants in the debate reported problems with the Albanian witnesses, who were apparently afraid of retaliation by the KLA and reluctant to admit that such an organization even existed or, indeed, that they had had any knowledge of the NATO bombs that had fallen on their villages.<sup>†</sup> Others noted that, although the Prosecution did show that crimes had been committed in Kosovo, it was not very successful at linking those crimes directly to Milošević. The insider witnesses that the Prosecution had produced for this purpose had either both oversold their importance and lacked credibility or—in the case of former high regime officials—were protecting their leader.<sup>‡</sup> Even participants in the debate who were otherwise supportive of trying Milošević in The Hague saw the strategic choices of the Prosecution as undercutting the trial's potential; they regretted that the Prosecution had made the trial too historical, trying to present Milošević as the exponent and executor of a long-standing Serbian nationalist project, which detracted from the war crimes issue and made his claim that he was defending the whole Serbian nation more credible to Serb ears.<sup>21</sup>

In other words, while they acknowledged the trial's negative impact in Serbia, the defenders of *Vreme* did not see the journalists' role as being one of educating the public about its benefits—of, implicitly, being advocates for the Tribunal. All the press could be responsible for was the fair recounting of what went on in the Trial Chamber and this, they argued, was being done. As Nenad Stefanović, *Vreme*'s correspondent from The Hague, put it:

[E]ven with the greatest sympathy for the objective difficulties with witnesses, [the trial so far] is not always achieving the legal standards which a trial of this kind must have. And if the most rigorous legal standards are not met, this and similar Hague trials are unlikely to help achieve in Serbia a higher level of acknowledgment of the truth about our own crimes, increase the determination to reveal their perpetrators, or better illuminate the period during which national ecstasy brought so many victims.... It seems to me that much of the debate about The Hague and the reporting on its trials comes out of two different schools of thought: one that seems to believe that that which is impossible to defend does not even deserve to be defended, and the other that would like to hear all arguments for the Prosecution and the Defense before the sentencing.<sup>22</sup>



Stefanović's final comments alluded to the second theme of the debate: the questions of Serb responsibility and Serb victims, which became the main sites of contestation about how the past needed to be confronted.

## **IV. Serb Responsibility and Serb Victims: How Should the Past Be Confronted?**

The dispute's second theme concerned a debate about whether discussions of the past could be productively framed in terms of Serbs' collective responsibility for the crimes committed or, to the contrary, a reckoning with the past needed to be as all-encompassing as possible, contextualizing the crimes and considering what *all* sides in the wars had done. The argument here was not just about defining victims and perpetrators, but about the more fundamental question of the extent and nature of the crimes committed: were Serb crimes of a different order compared to those of others, so that any evocation of Serb victims necessarily implied a false symmetry of responsibility? Could Serb intellectuals even invoke Serb victims without inevitably relativizing Serb crimes?

The most eloquent defense of the first position (taken by the critics of *Vreme*) was presented by Srđa Popović, who, in several contributions to *Vreme* and other media, argued the case that Serbia needed to reckon with its own crimes without considering those of other parties in the war and that responsibility for such crimes was inherently collective. First of all, "the crimes of which we speak were 'ethnic' and simply cannot be imagined in non-ethnic, non-national terms."<sup>23</sup> It was thus impossible to de-ethnicize the crimes because the victims were killed due to their ethnic belonging, and the call for the de-ethnicization of crimes was an expression of the discomfort felt by Serbs because the state that had committed those crimes was supported by a significant proportion of its citizens and institutions.<sup>24</sup> Echoing the German philosopher Karl Jaspers, Popović argued that "while the criminal responsibility of political leaders was individual, political and historical responsibility [was] quite collective" and would continue to be so as long as there was collective denial, justification and covering up of those crimes.<sup>25</sup> Second, Popović



argued that it was not necessary at present to examine the causes of these crimes and to seek to achieve an overall picture of what had happened: this, he noted, was important for the sake of achieving “historical truth,” but that that was a job best left to historians of the future.<sup>26</sup> The immediate task for Serbs and their institutions and elites was to focus only on Serbian crimes:

1. “Our” criminals are under our jurisdiction and we have the right and the obligation to insist that “our” state pursues “our” criminals in “our” interest...
2. The image of this country in the world, its international identity, was shaped in the years of Milošević’s wars almost exclusively through the images of Sarajevo, Vukovar, Dubrovnik, Srebrenica. Until then the world knew little about us. When Milošević fell we had the opportunity to change this image, to show the world that Milošević was falsely hiding behind the “nation” and that we do not accept as ours the crimes he committed and justified in the name of the “Serb nation” and that we have no reason to deny them. It is our national interest to make that clear.<sup>27</sup>

In Popović’s view, although members of other national groups had also committed crimes, this was a matter for their own societies. Recalling these other crimes was merely an attempt to minimize crimes committed by Serbs and represented an unacceptable *tu quoque* argument.<sup>28</sup> Popović’s viewpoint was echoed in a number of contributions from the critics of *Vreme*, as well as in other organs of the liberal intelligentsia, such as the fortnightly publication *Republika*, which noted that any attempt to establish a symmetry of crimes “is only a pretext to run away from responsibility for our own crimes.... We should not look over the fence at our neighbours’ gardens, but more openly question our own conscience.”<sup>29</sup>

Among the proponents of the alternative view, Stojan Cerović, once a close friend of Popović’s, most directly took issue with Popović’s arguments. Although he agreed that the questions of why Milošević at one point enjoyed so much popular support in Serbia, why the war took place, and why Serbia had come into conflict with “the whole world” deserved to be reckoned with, in his view, this reckoning could not be undertaken in

the one-sided and distorted way he believed Popović and the other critics of *Vreme* were doing.<sup>30</sup> For him, Popović's insistence on the ethnicization of the crimes effectively represented a "stubborn selection of facts and a refusal to think about anything other than 'Serb guilt.'"<sup>31</sup> In fact, Cerović argued, Serbs had not backed Milošević's policy in the 1990s to the extent that was being claimed, and the critics of *Vreme* were conveniently forgetting another part of the story—"the history of Serbian resistance which finally toppled Milošević."<sup>32</sup>

In an interview in September 2002, at the height of the polemic, Cerović characterized Popović's approach to the past in the following way:

The critics of *Vreme* and B-92 do it in such a way that promotes the idea that the fault is entirely Serb and that victims are exclusively on the other side. This may be the case in many instances but it is not entirely true. There are also a large number of victims on the Serb side.... Those who insist on [Serb responsibility] and with whom I am disagreeing affirm that in Serbia something happened that was comparable to Nazi Germany. That is of course not correct.<sup>33</sup>

Cerović's rejection of the comparison with Nazi Germany was based on the belief, shared among the defenders of *Vreme*, that Serb crimes—although more extensive—were not of a different order than crimes committed by others during the wars of the 1990s. From the perspective of this group, what Serbs had done in the 1990s was worthy of contempt and punishment, but was not equivalent to the Holocaust—Serbs' crimes were not morally unique.

This position was embodied by the appeal for a "third view" by the philologist and Belgrade University professor Ljubiša Rajić.\* Was it possible, he asked, to adopt an approach to the past in which Serbs were not cast exclusively as victims (as Serb nationalists did) or as perpetrators (as the critics of *Vreme* did)?

Am I allowed to think and say publicly that Muslims in Bosnia and Herzegovina were subjected as a nation to persecution, from simple theft to breaches of basic human rights to genocide, but that [Bosnian Muslim leader Alija] Izetbegović and [his party,] the SDA with their politics greatly contributed to that? Can I condemn Radovan Karadžić and the Serb leaders in the Krajina, but say that ordinary Serbs in Bosnia and Herzegovina and Croatia did have good reasons to fear majority rule in those states if they became independent? Do I have the right to say that Tuđman should be sitting right next to Milošević in the dock at The Hague? ... Am I allowed to be against Milošević and the KLA and NATO—all three? Am I even allowed to criticize NATO or

is that going to be considered a heresy? ... May I support the trials of those accused of war crimes, but still say that the Hague Tribunal's Prosecution is behaving like one of the parties in the conflict and is acting politically rather than legally? May I condemn crimes committed against Albanians but also think that the KLA is guilty of similar crimes against non-Albanians? Is there a difference between Albanian and non-Albanian refugees? ... Why shouldn't I be able to criticize the West without immediately being labelled a nationalist, or criticize nationalism without being branded a traitor? ... Is there a right to a third view?<sup>34</sup>

This call for a “third view” implied that there was no “false” symmetry of crimes because the crimes of Serbs and those against Serbs were indeed comparable. Responsibility for the conflicts of the 1990s and hence for the atrocities perpetrated was also not solely that of Milošević, who—although guilty—was not the only leader who deserved to be put on trial at the ICTY. And, from this perspective, NATO and the West were not external bystanders but direct participants in the wars, bearing their own share of responsibility.

Although such a position could be construed as a relativization of crimes committed by the Serb side (and was construed this way by the critics of *Vreme*), for the defenders of *Vreme* it was simply a more accurate and more complete account of the truth, which took into consideration causality and the actions of all, and sought to explain rather than to judge. The role of Serb intellectuals—as elsewhere—was to speak about the past honestly and portray it in all its complexity; it was not to act as “moral inquisitors” who pronounced judgment on their people and sought “some kind of mass exorcism” to force the nation to accept its own guilt.<sup>35</sup> In Cerović's view, such an approach to the past was not only wrong and unlikely to succeed, but was actually harmful.<sup>36</sup>

Cerović elaborated most clearly why the approach of the critics of *Vreme* was so detrimental for Serbia. It was harmful, first of all, for the evolution of democracy in Serbia, because claims about Serb responsibility were, in fact, playing into the nationalists' hands by giving credence to the discourse that “Milošević was the same as Serbia” and that the whole nation was on trial in The Hague.<sup>37</sup> Second, he argued it was counterproductive for overcoming denial in Serbia and achieving any genuine discussion of what had happened in the 1990s: “A discourse that sounds like an accusation, which presents unrealistic, impossible demands and goals, which rests on a misunderstanding of history and a lack of



compassion, inevitably creates exactly that which it condemns.”<sup>38</sup> Nobody, in his view, would accept dealing with the past under such conditions, and the *Vreme* critics’ insistence on such an approach would merely lead to the self-fulfilling prophecy that Serbia and its elites refused to acknowledge any past wrongdoing.<sup>39</sup> Finally, Cerović argued that the critics’ insistence that Serbs were incorrigible nationalists and that nothing had changed since Milošević’s fall was harmful because it was fueling those same Western perceptions that had underpinned the coercive policies applied against Serbia in the 1990s and that still had their proponents in Western capitals:

For me, it is a genuine problem that there are still many of those in the world who are continuing their policy of “toppling” the Belgrade regime. It is simply detrimental, and has proven to be not at all insignificant ... I thought at the time that Milošević was our great problem and we should not care who is helping us get rid of him and why. Now it turns out that nothing has been resolved and that the problem is Serbia itself and each one of us.<sup>40</sup>

For Cerović, if Serbs were still viewed as collectively responsible (even if not criminally guilty) for the actions of their former regime, and if the perception prevailed that despite Milošević’s fall nothing had changed, then what reason was there for the West to discontinue its coercive approach to Serbia? As he put it:

For [criminal] guilt, the consequence is trial and punishment, and for responsibility—what? ... Is the consequence for responsibility also punishment? ... Serbia did experience such collective punishment in the form of the sanctions and the NATO bombing and I heard none of [the critics of *Vreme*] protest against that.<sup>41</sup>

Cerović’s final comments indicated what was really at the heart of the debate on the *Milošević* trial and the issue of how to confront the past: the memory of the NATO bombing and the very different visions of that experience within the liberal intelligentsia that, thanks to the trial, had now burst onto Serbia’s public scene.

## **V. The Heart of the Matter: The NATO Intervention as Turning Point and Reference**



By beginning with the *Kosovo* indictment, the *Milošević* trial probably made it inevitable that, in Serbia, the proceedings against the country's former leader would be linked to the experience of the NATO bombing. The period between March and June 1999 is remembered very differently in the region: Whereas for Kosovar Albanians, it brings up the memory of mass deportations of hundreds of thousands of people, destruction and killing by the Serbian security forces, and ultimately liberation by NATO from years of Serbian oppression,<sup>\*</sup> for most Serbs, the memory of this period is synonymous above all with the fear and psychological trauma of being bombed nearly every night for 78 days, the deaths of civilians in the bombing raids, the wide-scale destruction of Serbia's infrastructure and economy, and—following the end of the intervention—the exodus of over a hundred thousand Serbs and other non-Albanians from Kosovo and the forcible loss of a territory that was traditionally viewed as Serbia's sacred heartland.<sup>†</sup> By constantly referring to the bombing rhetorically and with imagery, Milošević made the NATO intervention the focal point of both his defense before the Tribunal and his Serb audience.<sup>42</sup>

By recalling the memory of the NATO intervention, the *Milošević* trial also had a profound effect on the liberal intelligentsia. In the words of the writer Velimir Ćurguz Kazimir, it brought to the surface “that which we have somehow tried to repress: the issue of who did what during the time of the undoubtedly hardest experience—the year 1999 and the NATO bombing.”<sup>43</sup> Once again, two deeply divergent visions emerged of the causes of this trauma and who was responsible for it, two very different understandings of the role of intellectuals and the media during this period, and, above all, two irreconcilable positions on the part played by the West and its liberal ideology of “humanitarian intervention.” As the *Vreme* debate disclosed, the experience of the NATO bombing represented the underlying source of discord within Serbia's liberal intelligentsia—the real turning point of its history and the true *tačka razlaza* (moment of the parting of ways).<sup>44</sup> In this respect, Srđa Popović's call to leave the recent past to historians of the future in order to concentrate on the justice process elided the fundamental problem here—that notions of justice and responsibility were intimately connected to the memory of that past.

The centrality of the NATO intervention to all discussions of the recent past became clear when both sides in the 2002 debate began referring to a

petition signed by 27 prominent members of the liberal intelligentsia in April 1999, at the height of the bombing.<sup>‡</sup> The opposing positions taken in regard to this document reflected the widely different understandings of the Kosovo war and the NATO intervention among the critics and defenders of *Vreme*. The petition broadly reflected the *Vreme* defenders' view of a shared responsibility for the conflict and the negative role played by the West. It stated:

The democratic forces in Serbia find themselves caught between a rock and a hard place: NATO and the regime. As long-standing representatives and activists for a democratic and antisocialist Serbia, who have remained in our country during this difficult period and who desire for our country to once again find its place in the world community of states, we declare the following: We strongly condemn the NATO bombings which have hugely exacerbated the violence in Kosovo and caused the displacement of people outside and throughout Yugoslavia. We strongly condemn the ethnic cleansing of the Albanian population perpetrated by Yugoslav forces. We strongly condemn the violence of the Kosovo Liberation Army targeted against Serbs, moderate Albanians and other ethnic communities in Kosovo.<sup>45</sup>

The petition called for the immediate return of all the internally displaced people and refugees, respect for their human rights, and prosecution of all those responsible for crimes against humanity. It appealed to both the Serbian forces and the KLA to give up their most extreme demands and to return to the negotiating table.

At the same time, the petition presented a critique of the NATO intervention by highlighting its consequences: NATO's offensive action had broken a number of international covenants, as well as the constitutional provisions of several member countries, thus making "any struggle for the rule of law and human rights in this country and elsewhere in the world impossible."<sup>46</sup> It was destabilizing the whole of the southern Balkans, and, in Serbia, it was producing rising civilian casualties, along with the "complete destruction of the economic and cultural foundations" of its society and a patriotic reaction that was strengthening the regime.<sup>47</sup> The signatories thus noted that although they still opposed Serbia's "anti-democratic and authoritarian regime," they equally condemned "NATO's aggression."<sup>48</sup> Stating that "in the conflicts in the former Yugoslavia, the leaders of the international community committed many very grave mistakes," the petition warned that "new mistakes are leading to the worsening of the conflict and are taking us further away from any peaceful

resolution.”<sup>49</sup> It thus concluded: “We appeal to all: President Milošević, the representatives of the Kosovo Albanians, NATO, EU and US leaders to immediately stop all violence and military action and to engage in a search for a political solution.”<sup>50</sup>

The critics of *Vreme*, who first brought up this letter in the course of the debate, characterized it as “a lasting public document about who was on which side in the war of Milošević against the free world.”<sup>51</sup> Nataša Kandić thus recounted that she had been asked to sign the petition but had refused to do so because, in her view, it was Milošević alone who was responsible for the bombing campaign and would have thus been the only logical recipient of any such appeal.<sup>52</sup> For her, the signatories of the letter had by this action “*de facto* supported Milošević and entered into a devil’s pact with him, which still hasn’t been broken.”<sup>53</sup> Kandić also condemned *Vreme*’s and B-92’s decisions to continue their work in censored form during the NATO intervention, stating that there was little difference between their reporting and that of the regime press; notably nothing was published about the crimes that were being perpetrated against Albanians in Kosovo by the Serbian forces during the NATO bombing.\* Indeed, in Srđa Popović’s view, *Vreme*’s reporting of the time resembled an act of prostitution.<sup>54</sup>

The critics of *Vreme* generally viewed the NATO intervention favorably: It was “for our own good,” and, although it may have arrived “at the wrong time and for the wrong reasons” it was certainly “not undeserved.”<sup>55</sup> Consequently with their own position that Serb intellectuals should focus only on Serb crimes, they highlighted only the crimes against Albanians during the bombing, concluding, in the words of the lawyer Dragan Todorović, that NATO had “prevented the ethnic cleansing of a territory in the heart of Europe.”<sup>56</sup> When incidents leading to civilian deaths were mentioned, these were presented as mistakes that NATO had readily admitted.<sup>57</sup> Even NATO’s deliberate targeting of the Radio Television of Serbia (RTS) building on 23 April 1999, in which several employees were killed, was implicitly blamed on the RTS director (who had not evacuated the building despite warnings), without engaging in a discussion about whether state media could be considered a legitimate military target.<sup>58</sup> Finally, this group did not view the NATO bombing as



negative for the development of Serbian democracy; their only regret was that it was not followed by a ground intervention that would have toppled Milošević and carried out a grand purge of Serbia's institutions similar to the Allied treatment of Germany in 1945.

The defenders of *Vreme* had a diametrically opposed standpoint. For them, “the bombing was against the law, a war crime, and had nothing to do with humanism but with the interests of the United States and NATO.”<sup>59</sup> In fact, some of them argued, Milošević—no matter how repulsive his actions—was merely a bit player in a “dangerous militaristic game” whose protagonists were the United States and its Allies and whose effects were being felt worldwide.<sup>†</sup> From this perspective, the consequence of the NATO intervention was not the prevention of ethnic cleansing, as the critics of *Vreme* claimed; in fact, there would have been no mass deportation of Kosovar Albanians without it. Pointing out that the mass exodus of Albanians only began after the onset of the bombing campaign, the NGO activist Nadežda Radović thus argued: “The dropping of bombs produces massacres, enables and covers up crimes and keeps people living in fear. That was not hard to predict.”<sup>60</sup> In contrast to the critics of *Vreme*, this group saw NATO's “collateral damage”—as the Alliance called the incidents in which civilians were killed by its bombs<sup>61</sup>—as war crimes that needed to be prosecuted. As one participant in the debate put it: These people were “victims, in the same way that Muslims in Srebrenica, the citizens of Sarajevo, the Albanians and finally also the Serbs in Kosovo were victims.”<sup>62</sup>

Finally, echoing the April 1999 petition, the defenders of *Vreme* argued that NATO's intervention had not furthered the cause of democracy and human rights, but represented a setback for these same liberal values. As Nadežda Radović stated in her 1999 letter to Sonja Biserko which, like the petition, was reproduced in *Vreme* in the course of the debate:

Democracy can be achieved only by difficult and patient work, the creation of the atoms of a democratic society, the rules and procedures of democratic decision-making. The United States and NATO have reversed the evolution of democratic relations, made worthless the decade-long effort of our nongovernmental organizations, and rendered senseless the Gandhi-like resistance of the Albanian people for which I have the greatest respect.<sup>63</sup>



From this perspective, NATO's intervention did not represent the advent of a more resolute humanitarianism, but merely confirmed that military might and power politics still ruled the world with impunity.

The defenders of *Vreme* vehemently rejected accusations that the weekly had compromised its ethical and professional standards by accepting to appear in censored form during the NATO intervention. Arguing that they simply did the best they could under extreme conditions of strict state surveillance and even physical danger (the editor-in-chief of another newsmagazine was murdered during this time), they justified their decision by arguing that during this difficult period *Vreme* had helped “hundreds of thousands of people not to lose their common sense and their hope.”<sup>64</sup> Regarding the way that they were reporting on the unfolding NATO campaign, Stojan Cerović polemically asked: “Were we supposed to explain to our brainwashed population that it should love the NATO bombs? Were we supposed to believe that all those bridges were destroyed for pedagogical reasons to teach Serbs a lesson in democracy?”<sup>65</sup> From the perspective of this group, it was not *Vreme* that had acted immorally, but its critics, who—“while posturing and parading in Western salons”—had put themselves in the service of NATO's propaganda machine.<sup>66</sup> They had not shared the fate of their nation at this, its darkest hour, so they had no moral right to chastise those who had remained and condemn choices they could not understand.

This highly emotionally charged and acerbic exchange between former friends and coactivists showed in the clearest and most poignant way to what extent the particular trauma of the NATO intervention still lurked under the surface of any discussion of justice and accountability. The divisions that had come into being in those 78 days of the bombing campaign had, in the course of the *Vreme* debate some three-and-a-half years later, been articulated into comprehensive worldviews of Serbia's recent past, intellectual responsibility and how to confront the crimes of the 1990s. Whereas for some of the critics of *Vreme* the references to the NATO intervention were an “irrelevant theme” and a diversion from the main issue—that of Serb crimes<sup>67</sup>—for most of the participants on both sides in the debate, the actions and positions taken during the spring of 1999 represented the turning point of *Druga Srbija*'s historical trajectory

and the reference for their own approach to the questions that were at the core of its activism.

In particular, for the defenders of *Vreme* those positions were absolutely central to the forging of their own attitude toward the ICTY and help explain their reaction to the *Milošević* trial. As Stojan Cerović noted some two years after the end of the debate and shortly before his death, the NATO bombing—which he considered “unpardonable”<sup>68</sup>—had irrevocably changed his personal standpoint on Western policy and its human rights discourse, including the institution of the ICTY:

At that time we could see close up, through our own case, how badly even the most prestigious and best Western institutions could look. The propaganda lies were raw and rough, the military might excessive and non-selective just as that against which it had been employed, the international tribunal instrumentalized and politically manipulated. It became, of course, much harder to defend European values, even if there was no other way. And for Serbia after the war all roads back to the world led via The Hague. This was a problem not just for Serb nationalists, but it also insulted a sense of justice even among those who were immune to nationalism and who were certain that the Serb side had committed many crimes.<sup>69</sup>

As the *Vreme* debate showed, Cerović’s personal trajectory was paradigmatic for many liberal Serb intellectuals. Their loss of faith in the countries that embodied the ideals at the core of their activism provides the key to understanding their paradoxical reaction to the *Milošević* trial—which logically should have represented the crowning of their own efforts over the previous decade. In Cerović’s words, the bottom line was that “for Serbs, The Hague Tribunal is an instrument of those same powers that dropped humanitarian bombs here.”<sup>70</sup> Such a perception—forged at the time of the NATO bombing and confirmed by some of the ICTY’s subsequent actions<sup>\*</sup>—left no other outcome possible.

## **VI. Conclusion: The Parting of Ways—Legacies of *Milošević* and the *Vreme* Debate**

As Waters notes, “there is little evidence that reconciliation is occurring in the former Yugoslavia, or that individuals are converging on a common vision of the conflict, let alone that the ICTY has contributed to such a

process.”<sup>†</sup> Clearly, the lofty didactic ambitions for the Tribunal to establish an authoritative narrative of the 1990s in the region now seem misplaced, as does the image of the ICTY spearheading efforts to promote reconciliation through justice. Nevertheless, as the *Vreme* case shows, the *Milošević* trial did have an impact in Serbia beyond its more narrowly defined legal purpose by generating a debate about the recent past, the issue of war crimes, and the responsibility not just of Milošević’s regime but of Serbian society as a whole. Provoking discussion about the past is one way in which justice processes can contribute to broader social processes of reckoning with a difficult history of war and grave breaches of human rights. As one insightful study of the role of trials in periods of political transition notes:

The least we might fairly expect from courts, at such trying times, is a stimulus to democratic dialogue between those who wish us to remember very different things. A courtroom may not be the optimal place for such a dialogue to occur, still less to be resolved. But a courtroom is one place where it might fruitfully begin or be carried forward.<sup>71</sup>

The *Vreme* debate represents precisely such a beginning of dialogue, an opening of difficult subjects, and an elaboration of different viewpoints on the recent past. It is perfectly natural for such a debate to have occurred within the ranks of those who in the 1990s had been the most opposed to the war, Milošević’s policies and Serbian nationalism; indeed, the liberal intelligentsia is precisely where one would expect any such reckoning to begin. In this respect, despite problems with the prosecution of *Milošević* and the trial process itself—and without diminishing the serious insufficiencies of both—the ICTY did serve a useful social purpose in Serbia.

Understanding the social impact of ICL requires a careful consideration of local context, something political, historical, and anthropological analyses highlight. However, the emphasis on nationalism that some analysts have adopted obscures both the nuances in local visions of international justice and the reasons some members of the societies under scrutiny may not accept the “truths” generated by international trials. The *Vreme* debate is instructive in this respect, precisely because it pitted against each other individuals who had been long-standing opponents of Serb nationalism, who were keen to see their leader tried for



war crimes in Croatia, Bosnia, and Kosovo, and who—despite the misgivings some of them had about the ICTY—were agreed in principle that it was the only place where such a trial could take place. Dismissing the views of those unwilling to accept the *Milošević* Prosecution's narrative as mere retrograde nationalism thus misses the point here. Instead, the *Vreme* debate reflected the divergent understandings even among antinationalists of specific events that characterized and defined that past—what happened, why it happened, and, ultimately, who was responsible—along with different visions of how the past should be engaged with and the role that they as public intellectuals and members of civil society needed to play in such an endeavor.

For each side in this debate, the principal reference for its particular viewpoint was the experience of the NATO intervention, when the war came to Serbia in the most direct way and when the crimes in Kosovo for which Milošević was first indicted and tried were actually taking place. This was the turning point in the common trajectory of the liberal intelligentsia, the moment when old friendships and intellectual commitments came under scrutiny and when irreconcilable differences first appeared. The role played by the NATO bombing in the *Vreme* debate points to a broader conclusion that itself calls for more sustained research: that the memory of Western military intervention in the 1990s—whether it came too late (as for Croats and Bosniaks), on behalf of one's national group (as for Kosovar Albanians), or against it (as for Serbs)<sup>\*</sup>—continues to a considerable degree to shape local responses to the ICTY, still perceived as fundamentally a Western institution despite the international character of its staff and its UN framework. International justice cannot be divorced from the local experience of international intervention more generally, and the latter provides the lens through which the former is viewed and understood.

The debate in the liberal intelligentsia generated by the *Milošević* trial has left two lasting legacies in Serbia. The first of these is the definitive splintering of the *Druga Srbija* group. This is, of course, partly a natural consequence of the end of the war and the fall of Milošević. As one member of the group noted at the time, “it was all so much easier ‘when we were united.’ Now things are a lot more confusing since the lines of differentiation in our positions have become murkier.”<sup>72</sup> It is also testimony to the fact that inherent in any process of examining the past in



a democratic context is a divergence of viewpoints: “[I]n modern societies, telling stories that resonate identically in all quarters is much more problematic. When citizens gather at all to this end, they are likely to disagree about how the story goes.”<sup>73</sup> Indeed, this is something to be welcomed, as previous attempts in socialist Yugoslavia to deal with a difficult and divisive experience of war and atrocities took place in a context characterized by an ideologically conditioned official meta-narrative and political constraints on permissible discourse.

However, at the same time, the splintering of *Druga Srbija* itself created an unfortunate legacy, as this loose coalition of NGOs, intellectuals, and independent media represented the principal motor for processes of confronting Serbia’s recent history. Through both its activism and its public discourse, this group articulated the demand for political elites and society not to forget the past, and its disintegration diluted this demand and put a stop to the momentum and the optimism of the early post-Milošević phase. The *Vreme* debate thus opened the door for a broader reckoning with the 1990s in Serbia, but, instead of leading to a sustained process of investigation, debate, and dissemination of knowledge about the recent past, it effectively exhausted itself merely in producing irreconcilable ideological positions.

The two opposing narrative constructions generated by the *Vreme* debate have, to a large degree, continued to characterize the liberal segments of Serbian elite discourse on the recent past over the last 10 years. The first narrative presents Serbs as collectively responsible, in distinct and self-conscious contrast to the nationalist trope of Serbs as victims, and, argues that any genuine confrontation with the past means essentially a confrontation with that collective responsibility. From this perspective, invoking crimes committed against Serbs creates a false symmetry between Serb crimes and those of others, and only represents a denial of responsibility and a perpetuation of nationalism. The second narrative also acknowledges the crimes committed by Serbs against members of other national groups and agrees on the need to bring war criminals to justice, but argues that framing the past in terms of the Serbs’ collective responsibility is both wrong and counterproductive because it only reinforces the public’s sense of national victimization, thus playing into the hands of the nationalists. Instead—the argument goes—what is

needed is an all-encompassing consideration of the past, in which causes, consequences, and the crimes of all sides would be included.

Both of these narratives have also found expression in party politics and in public opinion in Serbia.<sup>\*</sup> Yet, neither one has managed to avoid the pitfalls predicted by its opponents in the *Vreme* debate and convincingly counter the still ubiquitous nationalist discourse they both oppose. The narrative of national responsibility has remained a minority view, and its proponents are marginalized and ostracized in Serbian society—in part because of their exclusive insistence on Serb crimes and their defense of coercive Western policies against Serbia, including the 1999 NATO bombing that continues to be viewed by a majority of the population as unmerited and unjust. At the same time, the narrative that insists on considering all victims, including Serb ones, in any examination of the past has become co-opted into a discourse that seeks to minimize the magnitude and specificity of Serb actions during the wars of the 1990s.<sup>†</sup> Indeed, the trope of “all sides have committed crimes” has come to stand for the avoidance of the past, rather than any genuine attempt to understand it. As a result, the kind of memory work that many hoped Serbian elites would undertake in the post-Milošević era remains a task for future generations.

## Antecedents to a Debate

Conflicts over the Transfer of Milošević

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*The Druga Serbia debate had antecedents—elements of discord that prevented it from becoming an effective ally of the Tribunal within Serbia as might have been expected. The liberal intelligentsia involved in the debate had held different views about events and conditions during the crucial period from the fall of Milošević to his extradition in 2001. Those involved ignored the dangerous complexity of the situation, which contained strong pressures from abroad to extradite Milošević, while the new democratic government was too fragile and unstable to meet external expectations. Druga Serbia's failure to grasp these ongoing tensions weakened the role it could have played in leading Serbia into a more genuine process of reckoning with the past.*

Dragović-Soso has analyzed a debate that took place in 2002 within Serbia's liberal intelligentsia, sparked by the *Milošević* trial. That debate had antecedents. This chapter further explores the causes and impacts of the discord within *Druga Serbia*, showing that, along with the debates over the Kosovo bombing that Dragović-Soso analyzes, it is rooted in different views regarding the events and conditions during the crucial period from 5

October 2000 through the transfer of Milošević on 28 June 2001. In the political arena, there were dramatic conflicts among the new authorities about the transfer, while at the same time the liberal intelligentsia failed to understand fully the complexities of the dramatically changed political situation after 5 October; instead, it became entangled in its own debates and divisions, overlooking the price that had to be paid for Milošević's transfer to the ICTY. The enormity of this price became clear only after the assassination of Prime Minister Zoran Đinđić. The divisions within the liberal intelligentsia showed that it did not succeed in becoming "the Tribunal's natural all[y] within Serbia," as Dragović-Soso says they should have been.<sup>1</sup> This, in turn, represented a failure to recognize the *political potential* in Serbia that might have led to a more genuine process of reckoning with the past.

As regards the cardinal issue—the effects and the influence of the *Milošević* trial—from the outset the ideologically confused arrest and transfer of Milošević minimized the effects of his trial on Serbian society's confrontation with war crimes perpetrated by Serbs. The country's new authorities arrested Milošević under external pressure and by the skin of their teeth: there was neither public sentiment in favor of trying Milošević before the Tribunal nor any consensus among the new authorities about transferring him to the Tribunal. In order to arrest Milošević and then transfer him, the Serbian government, led by Đinđić, needed to disguise its actions, hiding them from DS archrival and new FRY President Vojislav Koštunica, who opposed transfer. Because the federal level had constitutional authority for extraditions, the only way to transfer Milošević was to "hijack justice," which in itself served as propaganda against the Tribunal.<sup>2</sup> Milošević's transfer has almost experimentally confirmed the notion that confrontation with an appalling past—such as mass crimes committed in an armed conflict—may lead to internal conflicts so intense that they risk breaking up a fledgling democratic transition.<sup>3</sup> Such serious tensions actually did develop in Serbia under the excessive pressure from the West concerning the fulfilment of Serbia's obligations to the Tribunal, as well as from the strain of internal political conflicts and uncontrolled secret services.<sup>4</sup> All of this suggests just how unrealistic—even absurd—were the tremendous



expectations for the *Milošević* trial, having in mind the difficult situation in Serbia.

This chapter first looks at the views of the *Druga Srbija* from the moment Milošević's transfer came to the forefront. It draws principally on an analysis of the transcripts of the radio program *Peščanik*, which had been a focal point for members of *Druga Srbija* and other like-minded people of the time.\* It then examines the position taken by the new authorities who took control of the Serbian and federal governments after October 2000.†

## **I. The Liberal Intelligentsia and Its Views of the Tribunal after 5 October 2000**

*Druga Srbija* was practically the only critic of Milošević's nationalist and war policies and the only support for the Tribunal during the 1990s and beyond. For this reason, as Dragović-Soso has demonstrated, any division within it was of consequence, weakening the group's ability to call for a confrontation with the past and with war crimes. If we consider the attitudes expressed before Milošević's transfer, we see that *Druga Srbija* had become divided over a political dilemma: Was what happened on 5 October a question of continuity or revolution? Two views became dominant: One held that there had been a change in government only, while the ideological framework remained unaltered; the other argued that there had been a momentous change, akin to a revolution.

This division, dominant at the time, influenced the participants' attitudes about the Tribunal. Supporters of the latter view—the “optimists”—called for a constructive attitude toward the new government. They held that democratic Serbia, now free from Milošević, should be given some breathing space rather than be subject to merciless pressures. The other group—the “skeptics”—called for an unconditional confrontation with the past and the immediate fulfilment of all requests from the ICTY. In their view, this was the essential condition for Serbia to undergo a moral revival and become a normal country.

These two positions, analyzed by Dragović-Soso in another context, are also made clear in statements made by two protagonists of the polemic

in the weekly magazine *Vreme*—Stojan Cerović, a journalist, and Srđa Popović, a lawyer. Cerović represented the moderate optimists. In an interview with *Peščanik*, he argued that Serbs should start thinking anew, from scratch, because major changes had taken place, not only through the fall of Milošević, but also through previous events related to the NATO bombing. The Serbs were not the sole villains anymore; they, too, were now victims. All, therefore, were equal, and no one owed anything to anyone any longer.

Cerović thought that one should not relate to the new government in the same way as one did to Milošević. No absolute justice should be demanded from the new government, because it was “now made up of the best people we have, the people we had been rooting for all these years[.]”<sup>5</sup> Those in the West are not any better:

I watched how they formulate their own policies and I realized that there’s nothing special about it, [...] it is neither in a moral nor political way something especially superior or something that we would really have to admire and accept as God’s will.<sup>6</sup>

This exaggeration of the moral changes in post-Milošević Serbia led Cerović to suggest that Serbia did not have much reason to accept the pressure coming from the West, especially in the moral arena. He therefore felt that the pressure concerning the Tribunal was unjust:

[...] [Now, we’ve got that court in the Hague which is saying—come on, these are the terms, these are the deadlines, these are your obligations ... and that represents the agenda that was given to us, which now seems to me to be not quite fair ... I am no longer with those who [...] would speedily fulfil all those requests with great enthusiasm.... Personally, I feel stupid if this looks like, for those reasons, I would now defend Slobodan Milosevic, that’s not the real point; the point is that the charges were brought because of the war in Kosovo. So, that international court...is basically financed by America in the first place, and in a way I have a feeling that America can after all greatly affect its accusatory policies.<sup>7</sup>

Cerović was not suggesting that Serbia refuse to cooperate with the Tribunal, but he felt uneasy with it, as if the Tribunal were offending Serbian national dignity. Serbs “should not now rush into our opposition of the Hague court,” argued Cerović, but,

You know, I saw many very serious criticisms of the court in America. I again feel a little bit uncomfortable saying that. I’m afraid that if I also spend a lot of time on

criticizing the court, I would encourage people here to reject the Hague tribunal for the wrong reasons or in a wrong way, and think that it can be so easily overcome. Well, it can't be: We should not now rush into our opposition of the Hague court, but at the same time we could be aware of the fact that that isn't really what they claim it to be, that that is not really some real court, rather that it is to in large measure a political court.<sup>8</sup>

To Cerović, Serbs must be aware of this and maintain a degree of self-respect so that, when it comes to policy toward the Tribunal, they should be more restrained.<sup>9</sup> Cerović's view about the NATO bombardment assumed the traditional Serbian anti-Western position, and in this context provided emotional support for a reserved stance toward Western pressure to cooperate with the ICTY and arrest Milošević.

This view was taken most strongly by Aleksa Đilas.\* In his interview with *Peščanik*, he said that "the main reason for the West to insist on Milošević's transfer is that he is a man who opposed them and they now wish to teach him a lesson so that everyone may see what happens to people who oppose them. It is nothing but the politics of force."<sup>10</sup> According to Đilas,

... no worse reason exists to hand over a man to a court than for cash. You know, I consider the court in the Hague to be unjust. Still, it is what it is, unjust. If NATO were to threaten to tell us—if you don't extradite Milosevic, we'll give you a billion dollars, and if you do extradite him, we won't give you a billion dollars—well I would say that maybe we should extradite him. But like this, if we extradite a living man, our President—such as he is, but people voted for him; the elections weren't as they should have been but there were some type of elections—to now extradite him in order to get cash in hand, I think that that isn't the way to some national healing, toward historical consciousness and some higher social moral. That I really don't like.<sup>11</sup>

The skeptics opposed the optimists on all counts. Their proponent, Srđa Popović held that no revolution had occurred on 5 October. Instead, on that day, the *Demokratska opozicija Srbije* (Democratic Opposition of Serbia or DOS) came to power with U.S. help in a deal with Milošević's security services, which guaranteed that no blood would be shed in the transfer of power. The new government's reluctance to initiate a confrontation with the past ensured that no substantial changes took place. "What worries me the most[,]” said Popović,

is that I see all this talk about European integration, about ties with the world, and it seems that there is also incomprehension of the fact that the predominant image of this country is a country which started aggressive wars, which committed genocide against other nations, and which, if it wants to re-enter the community of nations, must accept that community's justice, and that community's justice is The Hague. There is an obvious unwillingness to do this, and the chief engineer of all those crimes [*i.e.* Milošević] sits a few kilometers down the road, as a tumor still present in this body.<sup>12</sup>

According to other skeptics, the old nationalist block had been consolidated within the new regime. Sonja Biserko, president of the Helsinki Committee for Human Rights in Serbia, noted that

[u]nder the name of Vojislav Koštunica, there was a consolidation of the nationalist block (the Church, the Academy, the Monarchy, the Army), which has always dreamt of a Greater Serbia and which is now attempting to consolidate Serbian ethnic territory, acquired in the recent wars, by “democratic means.”<sup>13</sup>

By avoiding a confrontation with the past, by rejecting lustration and protecting officials of the old regime, the new authorities acted in the interest of Milošević's power structure of war profiteers, security services, the Army, the Church, and all those who had supported Milošević. Petar Luković, the well-known Serbian journalist and one of the leading figures against Serbian nationalism, summarized the sense of disjointed bitterness experienced by those who had expected revolution, not merely transition:

I believed that Milošević's departure was to be definite. That the departure of this whole crowd ... who had poisoned our life for the past 13 years was to be definitive, therefore final and complete. But something happened which I really didn't expect.... All these people, who I sincerely believed were to end up in prison in The Hague, indicted, when democracy arrived—all of them managed to wash themselves clean in the past two months.... I must say that I am obsessed with one topic. That topic is war crimes and what was done in the past ten years. In these two months, that topic simply is not on the agenda. And as far as I can tell, it shall not be on the agenda. There is a conspiracy of silence at work here ... and it does not matter who slaughtered who, who killed—it is all over, finished.... How many of us are ready to cooperate with the Hague Tribunal? What shall we do with Milošević?<sup>14</sup>

Later, Popović claimed that at the time he had wished for an attempt “to finish the beast off through some form of cultural revolution”<sup>15</sup> and located the symbolic center of the tensions among the liberal intelligentsia about Serbia's direction within the question of cooperation with the ICTY:



The split [within *Druga Srbija*] developed over a non-critical approach to the nature of the October changes and to the “new government” itself, its intentions and the unity within the DOS. The test-case was the attitude about the Hague Tribunal. That was what caused the disintegration of the DOS and that was the reason for the assassination of Đinđić. I often wonder whether Stojan [Cеровić] would have changed his views had he lived to see the subsequent developments.<sup>16</sup>

Popović insists that, after 5 October, the new authorities would have genuinely changed the nature of the Milošević regime only if they had immediately shown a positive attitude toward cooperation with the Tribunal in words and deeds. This did not happen in a positive and clear way, but in fact cooperation with the ICTY had begun: Milošević was arrested and transferred to the Tribunal within six months after the Đinđić government was created. This was achieved under strong external pressure and amid dramatic internal conflicts over Milošević’s transfer which, surprisingly, passed almost unnoticed among members of *Druga Srbija*.

## **II. Conflicts within the New Government and Difficulties with Obligations to the ICTY**

The new authorities encountered great difficulties in arresting Milošević and transferring him to The Hague; ultimately, they proved unable to delegitimize Milošević’s war policies.<sup>\*</sup> The DOS coalition never talked about the Tribunal, before or after 5 October. Serbia’s obligation to hand over individuals indicted for war crimes was never mentioned in the electoral campaign. It was not deemed to be an issue to ponder over, and, if anyone did consider it, it was a very unpopular stance. The elections could not have been won by opposing Milošević’s war and nationalistic policies—it is well established that the electorate knew next to nothing about Serbian war crimes.<sup>†</sup> The new authorities’ ability to support the Tribunal was also severely undermined by the deal they had made with the security apparatus before 5 October in order to prevent violence against demonstrators, thanks to which the heads of security forces also secured their survival under the new government; as a consequence, the new Serbian government, led by Đinđić, remained weak, never managing to establish full control over the security forces.<sup>‡</sup>

The new authorities found themselves in an impossible situation: They did not know what to do with Milošević and were unable to reach any consensus over this issue. This was not strange in view of the composition of the DOS coalition and the major ideological differences within it.<sup>§</sup> No plan had been prepared in advance to deal with Milošević. It is known that the Chief of General Staff, Nebojša Pavković, took Koštunica to see Milošević on 6 October. Although the details of their meeting are not known, it appears that Koštunica offered guarantees that Milošević could remain in the presidential residence with his family, as well as certain guarantees concerning security and some technical matters; it also seems that the two made some political deals concerning key individuals in the Army, the police, and the state security.<sup>17</sup> Through his treatment of Milošević, Koštunica confirmed his own campaign promise that there would be “no revanchism.”<sup>18</sup> Thus a situation was created in which Milošević would be able to continue a relatively normal life as leader of the largest opposition party.

On 22 October 2000, negotiations started about the creation of a transitional government, which was to include the DOS, and about preparing for parliamentary elections. During the negotiations, representatives of Milošević’s SPS routinely sought their leader’s instructions on how to proceed.<sup>19</sup> In November 2000, barely a month after the fall of Milošević, his party held its Congress, well covered by all the media, and reelected him as its president. In January 2001, President Koštunica officially received Milošević in the latter’s capacity as the head of the strongest opposition party.

All of this demonstrates that Milošević’s road to The Hague was paved with nothing but conflicts and obstacles. The first obstacle was Koštunica’s view that there should be no extraditions or transfers to the ICTY, consistent with what he saw as an autonomous policy. Appearing briefly in front of gathered demonstrators on the night of 5 October, he said: “We need neither Moscow nor Washington. We shall be autonomous and independent. We shall have our own policy, we shall choose our own way.”<sup>20</sup> In his first interviews after 5 October, Kostunica made his notorious statement that the Tribunal was “*deveta rupa na svirali*”—the last of his worries.<sup>21</sup> In many subsequent statements he reiterated that “there are many more important issues for the country”<sup>22</sup> and that

cooperation with the Tribunal was “neither a priority nor a vital political interest.”<sup>23</sup> In his legalistic manner, he argued that cooperation with the ICTY would be possible only if a special Law on Cooperation was introduced, but then proceeded to obstruct passage of this law.\*

Koštunica proposed putting Milošević on trial in Serbia, which many believed to be a good idea, as this would have strengthened the domestic judiciary and influenced the public much more than a supposedly American and anti-Serbian international tribunal would. This idea also appeared acceptable to Đinđić, as a way to avoid domestic conflicts. However, it was soon rejected when it became clear that no trial of Milošević could be organized in Serbia<sup>†</sup> and that the United States would never agree to it,<sup>24</sup> as Đinđić came to realize after his first U.S. visit in February 2001. It was then that he was told in no uncertain terms what was expected from the Serbian government—the first item on the list was the arrest and transfer of Milošević to The Hague.<sup>‡</sup> Đinđić was also given a deadline: If Milošević were not arrested by 31 March, the U.S. administration would not certify to Congress that Serbia was cooperating with the ICTY, a certification necessary for continuation of America’s hundred million dollars in annual aid to Serbia.

One month later—within the U.S. deadline—Đinđić had Milošević arrested and then, on 28 June, transferred to the ICTY. Đinđić did this because it had to be done, for the sake of Serbia’s credibility and the expected financial support for Serbia’s destroyed economy; at the same time, it was a way to get rid of Milošević, as no one knew what else to do with him. Ultimately, however, it was also this decision that led to Đinđić’s assassination.\*

The impetus for this chain of events came not from Serbia’s new authorities, but rather from external factors, especially the United States, and from the frequently unpopular NGOs within *Druga Srbija*, whose views regularly coincided with those of the international community. By contrast, not a single Serbian political leader attempted to overcome the differences between the Serbian point of view and that of the West. At the time, anti-Western attitudes were a living heritage of Serbian nationalism and of Milošević’s rule; they were difficult to overcome. Serbia and the West each held to its own version of the truth, and the gap between the two was considerable. Đinđić chose to use American pressure as an excuse for



transferring Milošević; for domestic consumption, he argued that Serbia was forced to do so in order to avoid new sanctions and obtain financial support. As a consequence, Milošević's arrest and transfer were perceived by public opinion—including, as we have seen, a part of the liberal intelligentsia—as “selling Milošević for cash.”<sup>25</sup>

But there was more to the arrest than this financial dimension. It also demonstrated just how weak the Serbian government was, as it proved itself unable to control its own security services, let alone the military, which notionally was under Koštunica. It is not an overstatement to say that Milošević's arrest turned into a veritable drama, with the abject failure to arrest Milošević playing out in full view of both a domestic and international audience. Police officers, for example, failed to serve the summons and bring Milošević before the investigating judge because they were not admitted to Milošević's residence, prevented from entering by a military unit brought there to protect him.

When the police retreated, the drama degenerated into a farce.<sup>26</sup> The Đinđić government was forced to negotiate Milošević's surrender. In the end he agreed to it, but only after an agreement was signed and guaranteed by Koštunica for the FRY, Đinđić for the Serbian government, and Milan Milutinović, who was still president of Serbia. They guaranteed that the arrest was not based on any warrant issued by the ICTY, that Milošević would not be transferred to the Tribunal, and that he would be tried in a Serbian court in accordance with the Serbian Penal Code. In addition, Milošević was guaranteed favourable conditions of detention, including daily visits by his family, and, once imprisoned, Milošević was regularly visited not only by his family, but also by his political friends and allies.<sup>27</sup> The farce was perfected by the legal grounds used to arrest Milošević: The Serbian government chose to discredit him in public as a thief—he was charged with misuse of his official position to acquire substantial sums from the federal budget. Not a word was heard about any war crimes.<sup>28</sup>

Immediately after the arrest, Đinđić came under mounting pressure from Koštunica and the opposition to ignore the requests to transfer Milošević. Koštunica repeatedly insisted in public that no plans were under way to extradite Milošević; when Milošević was eventually transferred, Koštunica called it a coup d'état.<sup>29</sup> This was not simply rhetorical—the “Hague question” continued to destabilize the country, as



witnessed by the attempted coup by the *Crvene Beretke* (Red Berets) in November 2001.\*

### III. The Tribunal Caught in Milošević's Legacy

The issue of the Tribunal became the cause of deep-seated conflicts because it reflected fundamental ideological differences among the Serbian authorities after 5 October. Koštunica wanted to continue with the old national policy, albeit by more moderate means and with some international support, whereas Đinđić was trying to solve the Serbian national question once and for all by promptly integrating Serbia into the EU. The two diametrically opposed political positions formed two centers of power that divided between them the police and military services that were supposed to bring about Milošević's arrest and his transfer to the ICTY. In this way, the services received the message that they themselves were threatened, as many members of the military, the police, and the SDB had participated in the war and some had committed war crimes as well. This pluralism of power and control over the armed services brought Serbia to the brink of a civil war during Milošević's arrest and the two attempts at a violent restoration of the old regime—the *Crvene Beretke*'s rebellion and the assassination of Đinđić—both of which went under the motto "Stop The Hague."<sup>30</sup>

The liberal intelligentsia, plagued by its own internal divisions over the events of 5 October, failed to understand the real political situation in the country and was therefore reduced to conducting abstract debates within itself. This was to be expected, as *Druga Srbija* had never really influenced any political decisions regarding the ICTY and the transfer of Milošević. In addition, it was internally divided on the issue of "realism." Some of its members wished to create a widespread social awareness of the crimes committed by the Serbian regime, precisely because no such awareness existed in real life; that is why they kept pressuring the new government to address the issue of war crimes. Others argued that account had to be taken of the new reality created by the events of both 5 October and the NATO bombing of Serbia; they desired to situate the confrontation

with the past within an evolutionary perspective and within the framework of the general development of Serbian society.

Those who argued that nothing of consequence had happened on 5 October—that the ideological matrix remained unchanged after the fall of Milošević—were firm in expecting and advocating a true confrontation with the past, cooperation with the Tribunal, and the transfer of Milošević. They supported all forms of pressure against Serbia, without reservations. In fact, they acted as if a revolution had really taken place, while at the same time arguing that it had not yet. Overcome by a deep-seated feeling of guilt, which had always plagued *Druga Srbija*, they failed to perceive the small window of opportunity opened by Đinđić.

On the other hand, those who believed that a crucial change had taken place—and who were deeply affected by the bombing of Serbia—argued that the Serbs had both expiated a part of their guilt and opened a new door to the future. Being deeply offended by the bombing, they were psychologically responsive to Koštunica's defense of national dignity and his anti-Western stance, and that is how they too overlooked the same window of opportunity. Before his assassination, both groups had failed to fully comprehend Đinđić's standpoint and the importance of his decision to cooperate with the Tribunal. After the assassination, the remainder of *Druga Srbija* became focused on the need to explain how it came about and to push Serbia toward Europe.

## The Show and the Trial

The Political Death of Milošević

FLORIAN BIEBER

*University of Graz\**

*Despite the continued spectacle of his trial, widely broadcast in Serbia and viewed by his supporters, Milošević's political significance declined in Serbia after 2000. The funeral commemoration marked a brief moment when the eclectic groups of supporters converged. This chapter examines the contradiction between the "political death" of Milošević in 2000 and his revival as a "show star" during the trial in Serbia. It argues that despite the attention the trial enjoyed in Serbia, it marked the divorce between support for the politician Milošević and the narratives he helped popularize.*

—FROM THE OBITUARIES, MARCH 2006

*Serbia and the Socialist Party of Serbia are proud to have been led by him and that we were his contemporaries. History will never forgive us, if we give up what he fought for. For the final victory!*

—SOCIALIST PARTY OF SERBIA<sup>1</sup>

*For Slobodan Milošević. Thank you for all the betrayals and theft, for every drop of blood which thousands have lost because of you, for fear and uncertainty, for wasted lives and generations, dreams which were not fulfilled, for the horror and the wars, which were, without us being asked, waged in our names, for the load you placed on our shoulders.*

*We remember the tanks on the streets of Belgrade and the blood on its pavements.*

*We remember Vukovar. We remember Dubrovnik. We remember Knin and Krajina.*

*We remember Sarajevo. We remember Srebrenica. We remember the bombing.*

*We remember Kosovo...*

—NADA, SREĆKO, ŽIVKO, SLOBODA, VESELA, AND MILE ĆURIĆ<sup>2</sup>

On 18 March 2006 some eighty thousand people gathered in front of the Parliament of Serbia and Montenegro, as it then was, to commemorate the death of Milošević, while a few hundred meters away toward the center of town, past some Belgraders enjoying a walk on a sunny early spring day, around five hundred people released balloons to celebrate the final end to the Milošević era.<sup>3</sup>

The site of the commemoration in front of Parliament was no coincidence: It was on the same square that some half a million citizens from all over Serbia had brought the Milošević regime to its knees on 5 October 2000. On the same stage, just over two years after Milošević's death, Prime Minister Vojislav Koštunica and a cohort of fellow nationalists would commiserate over Kosovo's declaration of independence. The mass protests in 2000 marked the end of Milošević's regime, the commemoration in 2006 his death, and the Kosovo demonstration in 2008 the ultimate failure of his political project.

Ten years after he lost power, Milošević's political heritage is complex: The ideas that shaped his ascent and his agenda still hold currency among intellectual and political elites, although they are no longer willing to pursue those ideas by force. At the same time, no



significant political party or group harks back to the Milošević era or portrays itself as heir to his ideas or policies.

This chapter explores this apparent contradiction by discussing how and why the initially successful performance of Milošević at the ICTY did not translate into increased political support for his party or other parties with a nationalist platform. In order to examine this paradox, we will first explore the impact of the *Milošević* trial on the Serb audience, followed by a discussion on the decline of the fortunes of Milošević's *Socijalistička partija Srbije* (Socialist Party of Serbia or SPS) and third, the consequences of Milošević's death for politics in Serbia and for the legacy of his ideas.

## **I. Was There a Show/Trial Effect?**

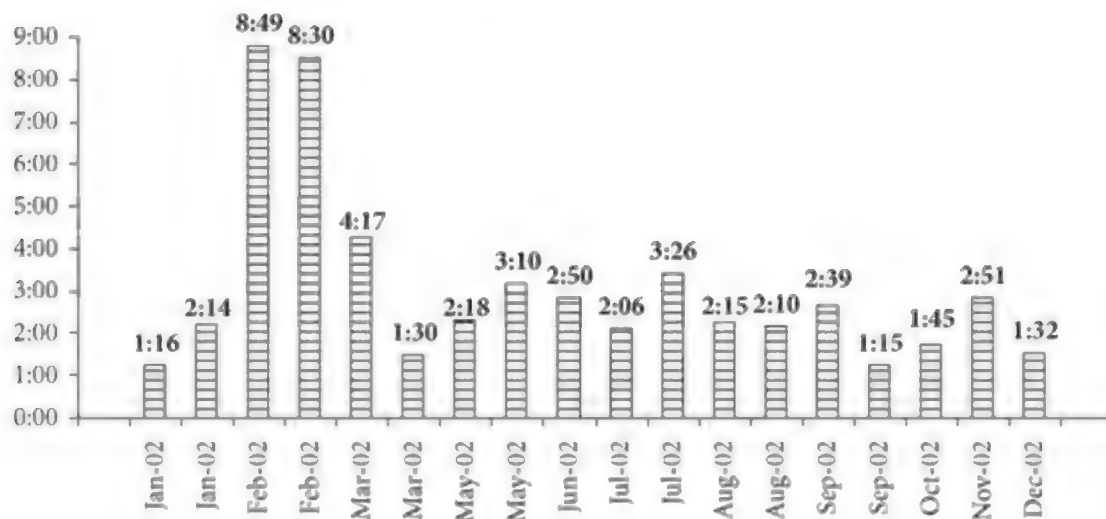
When the *Milošević* trial began in February 2002, millions in Serbia watched their former president perform in court, speaking to them directly and seeking to justify his time in power. During the early phases of the trial, many observers worried that the process might actually backfire by revitalizing the political fortunes of Milošević and reinvigorating nationalism in Serbia.<sup>4</sup> Did Milošević indeed become a “star” during the trial and if so, why did his popularity not translate into electoral results for his Socialist Party?

When the trial began, three TV channels in Serbia initially broadcasted the proceedings, and in the first days of the trial, their viewer numbers doubled. Half of all citizens of Serbia watched the third day of the trial, when Milošević began his opening statement, rising to nearly two-thirds watching parts of the fourth day of the trial (which took place on a holiday in Serbia).<sup>5</sup> In response, Goran Svilanović, the FRY's foreign minister, called the trial a “soap opera” for Serb viewers.<sup>6</sup>

However, such intense interest was not to last. As the trial dragged on with its often very technical discussion, viewer ratings declined.<sup>7</sup> By March 2002, the month after the trial began, the state broadcaster *Radio Televizija Srbije* (RTS) had terminated its live broadcasts, leaving only the federal news channel *YU Info* and *B92* to broadcast the trial. *RTS* reportedly made its decision due to high costs and lack of viewer interest.

But critics have pointed out that the continued popularity of the broadcasts on *B92* and the intense attention devoted to the trial in other media, including print, suggest these were not the real or primary considerations.<sup>8</sup> In the first months, according to *B92*, some hundred thousand viewers in Belgrade watched the trial, and twice as many in the rest of Serbia.<sup>9</sup>

The declining interest in the trial, however, was real. Observers in Serbia suggested that the goal of educating the population about war crimes through the broadcast was not achieved.<sup>10</sup> This decline in interest is not only reflected in lower ratings for the live broadcasts, but also in news coverage of the trial on TV and radio. After a spike during the opening of the trial in February, by the second half of March 2002 Milošević ceased to be the main topic of the electronic media (see Graph 1).<sup>\*</sup> Generally, broader ICTY-related topics, such as cooperation and conditionality, received greater attention than the *Milošević* trial. Other topics that gained in popularity instead were the DOS government, both in terms of its reforms and the crisis between the two main parties: Zoran Đinđić's DS, and Vojislav Koštunica's DSS.



**GRAPH 1** Time (in Hours) Devoted to Milošević in Main Evening News, 2002<sup>11</sup>

In fact, the decline of the viewing numbers coincided with what Florence Hartmann, the spokesperson of the Prosecutor, suggested: the trial was no longer a “media show[.]”<sup>12</sup>

The fact that B92 remained the primary broadcaster of the trial\* reflected its goal to educate viewers in Serbia about both the Tribunal itself and the past. This was also consonant with the view, then current among outside actors—including B92’s funders, that sustained media attention to the trial could have a beneficial effect in turning public opinion in Serbia away from violent nationalisms and towards confronting the past.<sup>13</sup> Throughout the trial, however, the impact of live broadcasts remained controversial within Serbia. A number of intellectuals and journalists argued that it benefited Milošević by providing a stage, whereas others argued that the content of the trial would eventually undermine Milošević’s narrative.<sup>14</sup>

The new visibility of Milošević was in itself a change for most citizens of Serbia. Not only had he been invisible after his fall from power until the beginning of his trial, he had also maintained a relatively low profile during most of his decade in power. Although in one sense ubiquitous and omnipresent through his and his party’s control of the state, media, and public life, as a person he was not actually very present in the public eye. His interviews and speeches from the 1990s barely fill 160 pages,<sup>15</sup> whereas his first collection of speeches, spanning the period of 1984 to 1989—that is, the period just before and during his ascent, fills more than twice as many pages.<sup>16</sup> His decade in power had been marked by his lack of engagement with citizens—a point Prelec takes up in a rather different context—and now the trial provided Serbs with daily exposure to his ideas and worldview. This was enhanced by the fact that Milošević was not addressing the Prosecution or the judges in court, but the Serb audience at home. As Draško Tankosić, a Serb marketing analyst, remarked, “it is obvious that the people are interested and it is equally obvious from Milošević’s performance that he is addressing our public. Thus, we are his primary target audience.”<sup>17</sup> Thus the question arises, how did his performance impact his ratings—did he succeed in reshaping his image in Serbia?

## **II. The Show and the Ratings**



Although the *Milošević* trial managed to grab the attention of many Serbs at least during its earliest phase, did this attention translate into a reassessment of the former president in Serbia? Before the beginning of the trial, Milošević's ratings had reached rock bottom. Neither his arrest in April 2001 nor his transfer to the ICTY in June did anything to improve his popularity.<sup>18</sup> Although the transfer was doubtless unpopular with most Serbs, and polls indicate that the Tribunal is perceived by a majority of Serbia's citizens as a political institution, a majority of citizens still also accepted cooperation with the ICTY as a necessary evil to avoid sanctions and advance toward EU accession.<sup>19</sup> Furthermore, during the immediate aftermath of 5 October 2000, memories of the Milošević era were still fresh, and most citizens felt Milošević should be tried, even if they preferred that it be for crimes he had committed against Serbs themselves.<sup>20</sup> And finally, during the first year after its fall from power, the SPS had little access to media to promote its view of events.

All of these factors resulted in a precipitous decline in Milošević's popularity right after his fall: in October 2000, only 14 percent had a positive view of Milošević, a rate that dropped to 9 percent by June 2001.<sup>21</sup> Milošević's popularity rating remained at this low level until 2002. Milošević, together with Vojislav Šešelj and Vuk Drašković, was one of the least popular political personalities in Serbia. The most significant shift by 2002 was not the increase in popularity for Milošević, but the continuous decline of the popularity of many of the DOS politicians who had replaced him in power.\*

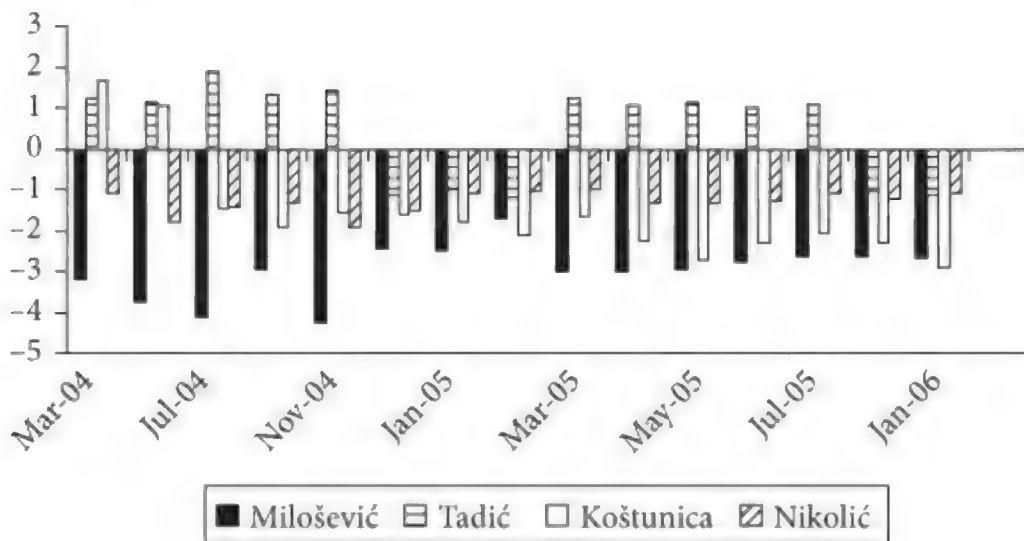
Milošević's low ratings improved as part of a broader change in the political climate after 2003. The rise of nationalist media such as *Kurir*, *Nacional*, and *TV Most* in 2002–03 gave a greater voice not just to SPS, but also to nationalist intellectuals and commentators. The trial contributed to the change of climate: An early poll after the beginning of the trial published in the weekly *NIN* suggests that 41.6 percent of those polled gave Milošević a rating of five out of five for his performance.<sup>22</sup> Similarly, a survey by the polling agency Strategic Marketing suggested that Milošević's rating increased during the beginning of the trial in early 2002, stabilizing at a slightly higher level than before. Another increase came right before the assassination of Zoran Đinđić in early 2003, but Milošević's ratings dropped sharply after the assassination and during the



subsequent state of emergency and police Operation *Sablja* (Sword).<sup>23</sup> The temporary rise of Milošević's popularity coincided with the large media attention to his trial, but as the media coverage waned, so did his popularity boost.<sup>24</sup>

From the end of the police Operation *Sablja* until the end of the trial—that is, from the end of the prosecution case and throughout most of the defense phase, Milošević's rankings varied greatly, from a low in July 2004 to a high in February 2005, though at no point during this period did the defendant's approval ratings exceed his negative ratings (see Graph 2).

This variation occurred in a context in which the ratings of most active politicians varied even more. Miroljub Labus ratings, for example, fell from a positive 1.46 rating to minus 7.03 during the period. Overall, few politicians were able to maintain consistently positive ratings, and the general decline of politicians affiliated with DOS is striking.<sup>26</sup>



**GRAPH 2** Approval Ratings for Key Politicians in Serbia, 2004–2006<sup>25</sup>

Milošević's shifting ratings throughout his trial suggest two larger trends. First, his popularity increased during the first phase of the trial, lasting until the assassination of Zoran Đinđić. This increase was caused both by his performance at the trial itself, which several other authors discuss in detail, and by the increasing frustration of many voters with the performance of the new government, expressed in declining support for DOS leaders after late 2000. Nonetheless, at no point during the first year

of his trial did Milošević's ratings exceed those of key DOS figures, such as Koštunica, Đinđić, and Labus. The fact that Milošević's popularity increased slightly prior to the Đinđić assassination can be linked to the intensive media campaign against the Đinđić government during this period, in part the result of an organized campaign to incite the murder of the prime minister,<sup>27</sup> of which Milošević was an indirect beneficiary.

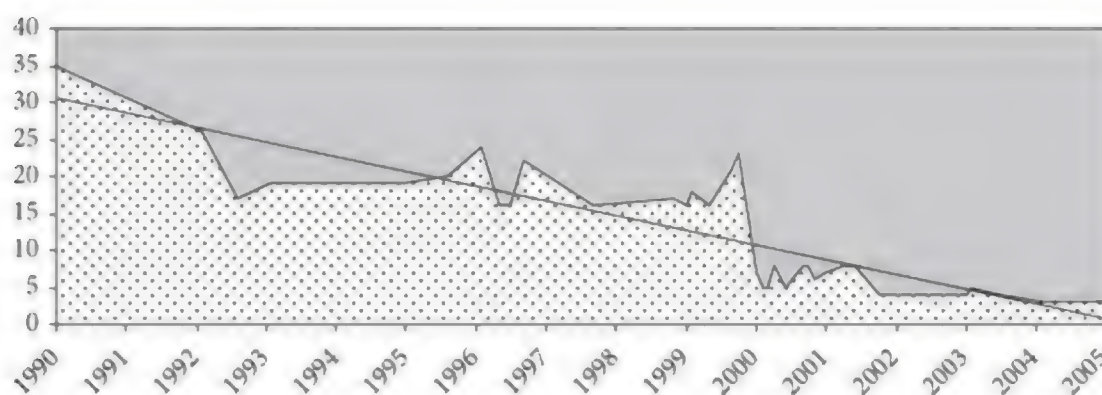
The dive in Milošević's rating in 2003, however, was most likely a result of solidarity with Đinđić after his murder and revelations of previous crimes discovered during the state of emergency following Đinđić's assassination, such as the discovery of the grave of Ivan Stambolić, reports of the war crimes committed by the Red Berets, and the latter's links to organized crime. With the accession of Vojislav Koštunica and SPS support for his minority government, we can observe a period of normalization in which Milošević's ratings no longer changed significantly, but moved from the bottom of the rankings to the midfield of Serbian politicians.

### **III. The End of the Politician Milošević**

As we move from the impact of the trial on the ratings of Milošević, it is also useful to explore how his increased popularity affected—or rather failed to affect—the popularity of his political party, the SPS. The decline of the party prior to his trial, which was linked to Milošević's own declining political fortunes, is a part of this story.

One key to understanding Milošević's ultimate fall lies in the nature of his earlier ascent. Although his rise was rapid and the events surrounding it often dramatic and disruptive, Milošević was no revolutionary, but an insider. Milošević had never been in opposition; his rise had always been from power to a higher level of power.<sup>28</sup> As such, he could always rely not only on the power of the party, but also on the state. The support he enjoyed as an incumbent drew on authoritarian tendencies among parts of the electorate that favored the party in power. Furthermore, patronage allowed him to secure support and buy votes, especially from employees in the public administration and state-owned enterprises.

His political appeal also favored him only in power; once out of power his support declined drastically. In the September 2000 election, the last he contested in office, the final results gave him 37 percent of the vote for president and the SPS 32 percent for the Federal Parliament. Even though the results of those elections were never fully verified, most preelection polls also gave Milošević and his party around a third of the vote.<sup>29</sup> Within three months, in new elections following the overthrow of the Milošević regime, support for the SPS slumped to a mere 13.5 percent.<sup>30</sup> The SPS would not surpass even this much-reduced result for another decade, whether with the name of Slobodan Milošević on its electoral list, as in 2003, or as a party ready to form a coalition with the Democratic Party, as it did in 2008.



**GRAPH 3** Support among Voters for SPS in Percent According to Opinion Polls (1990–2005)<sup>33</sup>

In fact, according to polling data (see Graph 3), fewer than a third of citizens who voted for Milošević in 2000 chose his party in 2003, with more of his former voters (38 percent) voting for the *Srpska radikalna stranka* (Serb Radical Party or SRS) instead.<sup>31</sup> Thus, the number of voters the party was able to secure after 2000 hovered around one-fifth of the votes the party won in September 2000. Even among the voters who mostly voted for the SPS over this period, many regularly switched their support between SRS and SPS, whereas the only other party with which a significant number of SPS voters identified was the DSS.<sup>32</sup>

So why did Milošević's fall from power in 2000 reduce the SPS to a party of single digits—and why has the party gradually broken with the

Milošević legacy? There are three reasons, which are really about the political death of Milošević: demographic change, ideological incoherence, and conflict between the party and Milošević. These reasons together created a disconnection between popular support for Milošević's narrative—expressed through the trial—and the rejection of politics based on Milošević's agenda.

## **A. Demographic decline**

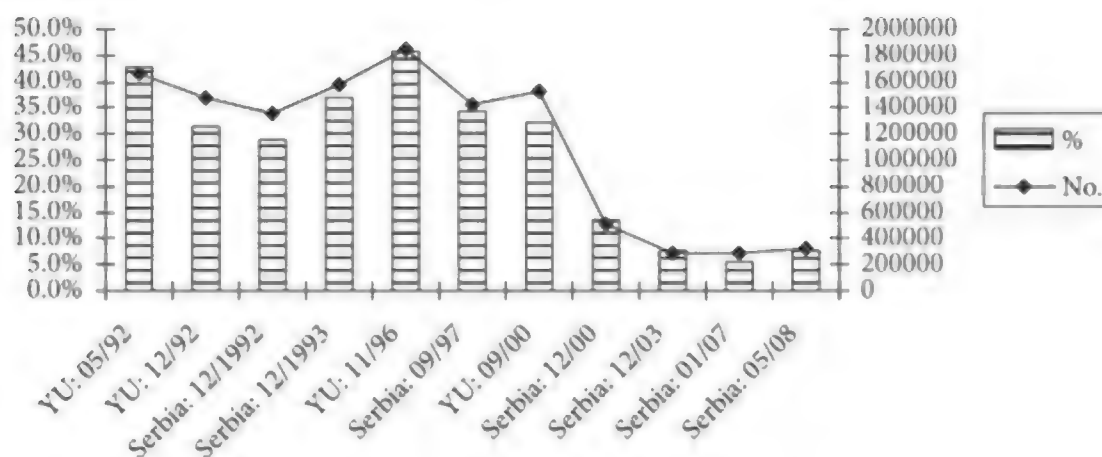
The decline of the SPS began not in 2000, but in the early 1990s—that is, when Milošević and his party were seemingly at their height. After 1992, the SPS could command the support of only a quarter to a fifth of the total electorate, resulting in election results giving the SPS between 28.8 (1992) and 45.4 percent (1997) of the vote and forcing it to rely on changing coalition partners in the 1990s (see Graph 4).<sup>34</sup>

The number of citizens strongly identifying with the party declined more during the 1990s than is reflected in election results. Although in 1993 14 percent of the electorate strongly identified with the party, this number declined to 12 percent in 1996 and 8 percent in 1998. Subsequently, even the number of those with a weak identification with the party declined, decreasing from 8 percent in 1998 to 3 percent in 2001.<sup>35</sup>

This narrowing had a demographic basis. The SPS, together with the SRS, had become a party of the losers of transition even before the transition began after 2000.<sup>36</sup> Most workers abandoned the party after 1992, making it at first a party predominantly of farmers; later, it drew more support from citizens who did not take part in the formal work sector, such as pensioners and housewives. In particular, the party enjoyed its greatest support from older persons. In 1996, 40 percent of SPS supporters were over 60, whereas the share of the voting-age population over 60 according to the 1991 census amounted to only 23 percent; in June 2003, 57 percent of SPS voters were over 50, a category that accounted for around 45 percent of the voting-age population.<sup>37</sup> This demographic profile made the SPS “the party of the oldest, least educated and poorest voters.”<sup>38</sup> Such a voter profile has meant that—unlike the SRS, which was also a party of transition losers but was able to draw on younger voters—the SPS has been unable to rejuvenate itself and has remained inherently



restricted in its electoral potential. By the time of Milošević's death, SPS had become one of the two parties with the most homogenous voter base.<sup>39</sup> It was only after Milošević's death that the party was able to reorient itself as a center-left party and become the third largest party in the 2012 parliamentary elections with 14.7 percent of the vote (together with two smaller coalition partners).



**GRAPH 4** Support for the Socialist Party in Serbian and Yugoslav elections 1992–2000.\*

Thus one factor explaining the decline of the SPS has been its restricted and shrinking electoral base; even before Milošević's fall, it had ceased to be a catchall party able to secure electoral support among all or at least most social groups. However, to understand this limitation, we need to turn to the ideology of the party and its voters, because the inability of the SPS to rejuvenate itself lay mostly with its ideological incoherence.

## B. Ideological incoherence

The homogeneity of the SPS voter base stands in contrast with the party's heterogeneous ideological profile, and there is no agreement among Serbian political scientists how to categorize the party. Some have categorized the party as being (extreme) left-wing (as most of its voters self-identify), whereas others have called it national-conservative extremist (*krajnjaši*). Others have sought to square the circle of nationalism and socialism by calling the party social-nationalist.<sup>40</sup>

Although Milošević had come to power by forging an ultimately short-lived, eclectic coalition representing conflicting ideas, his party as an institution reflected only a small segment of that coalition. The contradictory streams his nationalist mobilization unified—including monarchists, communists, and those nostalgic for the SFRY; supporters of the Serbian Orthodox Church; Chetniks; and others<sup>41</sup>—could not coexist within one party. With the introduction of multiparty elections, different parties represented these streams and the Socialist Party advocated a fusion, maintaining the Yugoslav and socialist heritage, but infusing it with nationalism and antiglobalization; this ideological profile was fed by nostalgia for the previous system, but without the *bratstvo i jedinstvo* (brotherhood and unity) and high level of decentralization of late Yugoslavia. The fusion of left and right ideologies was common to a number of other post-Communist left-wing nationalist incumbents, but inherently narrower than the broader nationalist movement Milošević headed prior to the first multiparty elections.<sup>42</sup>

By the mid-1990s, the electorate supporting the left nationalist agenda began declining, as the electorate to which this platform appealed was disproportionately older voters and as disappointment with declining living standards and corruption made voters less likely to endorse the incumbent. Furthermore, the failure of the nationalist agenda on the battlefield in Croatia and Bosnia also undermined the party's nationalist credentials. In response, left-wing nationalist parties such as the SPS had two choices: either to opt for a more reformist social democratic program or to promote social populism. The latter option was a successful strategy for opposition parties, not for incumbents, whereas the former was a choice SPS was unwilling or unable to engage in until 2008, due to the wars and the regional context. As a result, the SPS retained its relatively narrow ideological profile.

In many respects, the SPS became an anti-system party after 2000, in part because the party considered the events of 5 October a coup d'état. Yet at the same time, it endorsed EU integration at its sixth party congress in January 2003 and accepted privatization in principle (though it rejected post-2000 Serbian privatization).<sup>43</sup> In addition to adopting a socialist populist line, it described liberal ideas (such as the post-2000 privatization and globalization) as “the destruction of our national identity and specificity” and singled out separatists and chauvinists—code for Kosovar

Albanians and other competing nationalisms in the region—as its enemies.<sup>44</sup> Its nationalism remained cloaked in defense against globalization, terrorism, and nationalist extremists. The party's antiglobalist rhetoric drew on widespread opposition to the NATO intervention in 1999, and rhetoric about terrorist threats, cloaked in post 9-11 language, targeted primarily Kosovar Albanians. The SPS' self-presentation as a party of continuity—not just with the Milošević era, but also with its nostalgia for the Yugoslav period and the Communist system<sup>45</sup>—has prevented the party from endorsing an uncompromising nationalist position, as the Radical Party did, and also made it keep its distance from the increasingly popular Serbian Orthodox Church. It was thus unable to draw on these particular national themes that gained increasing popularity, especially after Milošević's fall from power.

The program of the party thus remained inherently transitional—between the authoritarianism of late Communism and a careful endorsement of reforms, combined with a relatively constrained nationalism articulated as defense of sovereignty. Even its social populism was unable to persuade nearly as many voters as the social populist promises of either the SRS or the *Pokret snaga Srbije* (Movement for the Power of Serbia or PSS) during its meteoric rise and fall in 2004–05, as it lacked a motivated base of supporters (such as the Radicals) or charismatic leaders.

Between its demographic constraints and its programmatic choices, the SPS was not only locked into low electoral outcomes, but was also unable to reform itself. Soon after Milošević's fall, observers in Serbia had predicted—or hoped for—a transition of the SPS into a moderate social democratic force. The lack of another party on the political left, despite widespread support for left-wing policies, appeared to be an opportunity for party reform. Hope for modernization of the party was given additional impetus when the SPS lent its support to the minority government of Koštunica in March 2004.<sup>46</sup> The return to power in 2003 of the reformed HDZ in Croatia was additionally seen as a model for the transformation of previously authoritarian parties in the region. Such a transformation was, however, difficult for the SPS.

The party's electoral base—relatively homogeneous and less likely to have benefitted by the recent political changes—had become so



radicalized that it would be unlikely to follow any reform. As late as 2007, after both Milošević's death and the party's support for a minority government, only 16 percent of its supporters thought that democracy was the best political system, with 29 percent making no distinction between democracy and nondemocratic regimes and 37 percent supporting the assessment that nondemocratic systems can be better in certain circumstances.<sup>47</sup> The authoritarian and conservative profile of the voters<sup>\*</sup> led to a growing rift with the leadership, which had increasingly abandoned the confrontational positions its voters held since this part of the political spectrum was covered effectively by the SRS.<sup>48</sup> In addition, as we shall see, Milošević's highly visible presence in The Hague proved to be an obstacle rather than an asset for the party.<sup>†</sup>

### **C. Milošević versus his party**

Probably the biggest obstacle to a transformation of the party was the continued political relevance of Milošević.<sup>49</sup> The fact that his performance in court did not translate into votes was primarily the result of the increasingly difficult relations between Milošević and the party he had created.

The SPS was shaken by internal divisions in the aftermath of its fall from power; only well after Milošević's death was the party able to regain some coherence. After October 2000, it first struggled with divisions and split-offs in the immediate aftermath of its defeat, with Zoran Lilić forming the *Srpska socijaldemokratska partija* (Serbian Social Democratic Party) and Milorad Vučelić the *Socijalistička demokratska partija* (Socialist Democratic Party). Later, in 2002, Branislav Ivković sought to take control of the SPS, but was excluded from the party and formed his *Socijalistička narodna stranka* (Socialist People's Party). None of these split-offs performed well in elections, but they inevitably divided and distracted the party elites. In 2005, five out of the 22 members of the SPS's parliamentary group broke away, accusing the party leadership of betraying the policy of Milošević.<sup>50</sup> Already in 2002, the party leadership had come into conflict with Milošević himself after the party refused his request to endorse Vojislav Šešelj's candidacy for the Serbian presidency and instead nominated Velimir "Bata" Živojinović.<sup>51</sup> The efforts by the



party leadership to develop an independent profile meant that the party could not fully benefit from the increase in popularity Milošević enjoyed due to his performance in court. Simultaneously, the SPS could not credibly position itself as a social-democratic party as long as it remained linked to Milošević, who opposed a move toward social democracy and closer ties to center-left parties in Europe, while the nationalist space was already taken over by the Serb Radical Party, which was more effective in mixing radical nationalism with social populism. It is this fraught relationship between Milošević and his party that partly explains why SRS was better able to attract voters dissatisfied with the post-2000 reforms than was the SPS.

Indeed, given this conflict between Milošević and the SPS, it might be more appropriate to consider the Radical Party as the main potential beneficiary of Milošević's trial, especially considering that the SRS emerged as the largest party in early parliamentary elections in December 2003. However, the electoral victory of the SRS in the elections was not a vote for the past—in fact, the Radicals' success can be linked to the voluntary surrender of Vojislav Šešelj to the ICTY in early 2003 and his replacement by the more moderate-sounding Tomislav Nikolić. The voters endorsed the SRS in December 2003 and in subsequent elections mostly due to dissatisfaction with contemporary reforms rather than a desire to resurrect the 1990s.<sup>52</sup> Although it might be tempting to link the rise of the SRS in the 2003 elections\* to the court case and the stage it provided for the promotion of a nationalist history of the disintegration of Yugoslavia, it is more plausible to link the rise of the SRS to domestic political dynamics in Serbia, including dissatisfaction with the outcome of economic reforms and the political infighting among former members of DOS. It is particularly noteworthy that after 2003 it was the SRS that benefited from voter dissatisfaction, not the SPS, even though Milošević formally led the party list in the December 2003 elections. In short, the success of the SRS after 2003 came not because their voters were longing for the past when the Radicals shared power with the SPS, but because they forgot this past.<sup>53</sup> In such a context, the permanent reminder of the past that the trial became gave Milošević visibility, but did not translate into electoral gains for his party and did not clearly contribute to the rise of the SRS as the largest party in Serbia between 2003 and 2008.<sup>†</sup>

## IV. A Show for an Idea?

However, it is not just these three factors that undermined Milošević's ability to experience a political revival in Serbia during his absence. The trial presented Milošević an opportunity to discuss the past, but the 1990s were a period of suffering, shortages, and war that most citizens sought to forget. Thus, although his narrative enjoyed considerable support, it was also associated with a past that was universally perceived negatively. In essence, Milošević used the trial to recite his memoirs to his former electorate. But even if the trial undeniably increased Milošević's visibility, why would anybody want to hear his narrative considering the painful memories it evoked, and why would it have greater credibility than the other narrative presented at in the trial—that of the Prosecution?

In brief, Milošević became the spokesman for an idea: that he stood accused as representative of the Serbian nation and thus would defend not just himself, but also the nation.

In his defense strategy, as Del Ponte and other authors also show, Milošević sought to discredit witnesses of the Prosecution, in the process displaying an exceptional (and self-incriminating) knowledge of detail. He did not seek only to undermine witnesses' credibility and their narratives, however, but also presented an alternative narrative. This narrative focused on questioning key events in the Prosecution's chronology of the conflicts, such the killing of Albanians in the village of Račak in 1999, in order to argue that the prime responsibility for the dissolution of Yugoslavia and the crimes that admittedly occurred lay with the Western powers and their political leaders.<sup>54</sup>

Moreover, Milošević presented this not as a personal interpretation or defense, but a collective one on behalf of the Serb nation. During his opening statement, Milošević high lighted his role in this relationship:

But it is not only the Serb intelligentsia and the Academy of Arts and Sciences and the St. Vidovdan battle of Kosovo, but everybody who lent support, the government, the parliament, the various political organisations, the media. They all stand accused here. All this stands accused. The citizens stand accused, citizens who lent their massive support and elected their representatives at free party elections. We just agree on one point here, that my conduct was the expression of the will of the people.<sup>55</sup>

The fact that the Prosecution built its case on a specific set of claims about the political context, including the rise of nationalism in the 1980s and the idea of Greater Serbia, simply complemented and enhanced Milošević's strategic choice to defend a narrative about reality, rather than himself for particular crimes.\*

In addition, although its claims relied on a certain interpretation of recent Yugoslav history, the Prosecution's overriding aim was to persuade the *judges* of their arguments, whereas Milošević had a different target. Thus the Prosecution may well have been more persuasive in making its case before the Chamber, but was neither able nor willing to make that case to a Serbian audience. In fact, nobody was advancing a persuasive alternative case for the dissolution of Yugoslavia and the wars in Croatia, Bosnia, and Kosovo—the interpretive field was in effect left to Milošević.

Besides the specific effort of Milošević to address his audience in Serbia rather than the Tribunal, other factors facilitated the greater credence Serbs gave to Milošević's narrative than the one presented by the Prosecution. Technical aspects played their role, as Milošević spoke in Serbian, thus being directly understood by his audience whereas the Prosecution spoke in English, making their arguments accessible only through translation.\* Even the structure and processes of the ICTY contributed to the rehabilitation and presentability of Milošević—a man who, after all, had become almost entirely discredited within Serbia. In an insightful analysis in *Republika*, Dragan Jovanov likens Milošević to Dirty Harry and notes that the very spectacle of the trial gave additional credence to Milošević and other indicted war criminals:

When you put ... local gangsters, camp guards, semi-literate national ideologists, butchers, alcoholics, psychopaths dressed in expensive suits and ties into well-choreographed TV studios, encased with sophisticated professional-legal terminology and a made-up choreography—the global choreography of the world order and justice—they no longer function as a criminal gang, army and paramilitary commanders and executioners and ideological psychopaths, bearded, dirty and possessed from the TV screens in Vukovar and the hills around Sarajevo, but rather as politicians—masters with political conviction and a national and social mission.<sup>56</sup>

In light of this, it is perhaps unsurprising that the actual effect of broadcasting the trial in Serbia was to raise Milošević's profile and encourage his much-reduced base of supporters. Indeed, it is not without



irony that it was supporters of Milošević who protested when RTS interrupted its live broadcasts and who became loyal viewers of B92, which Milošević himself had sought repeatedly to close down in the 1990s.

In the domestic discourse, the newly governing parties made no concerted effort to offer a new interpretation of the 1990s. New textbooks were more preoccupied with strengthening an anti-Communist narrative critical of the Yugoslav project than with addressing the wars of the 1990s, which were glossed over.<sup>57</sup> Other efforts to confront the public with alternative narratives of the wars of the 1990s were largely limited to initiatives by NGOs, which were, as Dragović-Soso and Pešić describe, increasingly at odds with themselves. The political elite did not fundamentally challenge the dominant perception of the conflict of the 1990s and, rather than using the ICTY to promote a debate about the past, “hijacked” transitional justice to advance individual political agendas.<sup>58</sup>

In 2005, the *Milošević* trial itself would provide the single most significant opportunity to challenge the narrative Milošević had been promoting in his and the Serbian nation’s defense and thereby also implicitly test the theory that intense coverage of a comprehensive and fair trial could discredit Milošević and his policies rather than provide them a sympathetic platform. This turning point in the trial, which had a clear impact on its audience in Serbia, was the screening of a video showing the execution of six Bosnian Muslim men and boys by members of the *Škorpioni* paramilitary unit near Srebrenica in 1995.

The video was first shown at the *Milošević* trial in June 2005 and rebroadcast on B92, with state television RTS showing it a few days later.<sup>59</sup> The arrest of members of the *Škorpioni*, the immediate condemnation of their actions by President Tadić and his visit to Srebrenica at the anniversary of the genocide the following month triggered a brief episode of soul-searching and a complex—and apparently temporary—shift in public awareness of war crimes committed by Serbs.<sup>60</sup>

Nationalist groups attempted to minimize the impact of the video. The Radical Party released photos and videos showing war crimes against Serbs by non-Serbs, seeking to put the video into a context that was more sympathetic toward the dominant narrative.\* Surveys in the aftermath of



the video's release paint a contradictory picture of its effects: Although support for the ICTY grew, one-third believed that the video was fabricated, and many felt that it obscured crimes committed against Serbs.<sup>61</sup> Such views were given sympathetic coverage in the nationalist press, such as *Kurir* and *Večernje novosti*.<sup>62</sup> Thus, although the video visually confronted many Serbs for the first time with war crimes, the impact on public opinion appears to have been less clear-cut.<sup>63</sup>

The modest impact of the video on public awareness of war crimes appears to be replicated for the *Milošević* trial as a whole. Although the trial brought crimes from Croatia, Bosnia, and Kosovo to Serbian TV screens on a nearly daily basis for over four years, Serbs' awareness of war crimes committed by Serb forces did not increase. In fact, awareness of particular crimes committed by Serb forces, such as the siege of Vukovar, the paramilitary massacres in Bijeljina or the expulsion of Albanians from Kosovo, *decreased* between 2001 and 2006 (see [Table 1](#)). Only Srebrenica was more widely recognized six years after the end of the Milošević regime—possibly a consequence of the *Škorpioni* video, though it would be difficult to separate out the effects of the trial and video from the broader international discourse about what has become the signal crime of the Bosnian conflict. Even for the mass murder of Muslim men in Srebrenica, the increase was minimal, and only half of those surveyed acknowledged that this crime took place,<sup>64</sup> while large numbers of Serbs continue to view themselves as less culpable for the crimes of the wars than other former Yugoslavs.<sup>†</sup> These numbers leave the sobering impression that despite the *Milošević* trial and numerous other efforts to discuss the disintegration of Yugoslavia after 2000, the impact has been minimal and, in Serbia at least, forgetting is stronger than remembering.

TABLE 1 **Perception of Wartime Events in Serbia, 2004–2006**<sup>65</sup>

	Heard of event			Believe it happened			Consider it a crime		
	2004	2005	2006	2004	2005	2006	2004	2005	2006
Large number of Bosniaks killed in Srebrenica	78	72	71	48	50	50	37	42	43
Sarajevo was under siege	51	55	58	40	40	48	16	18	18
Albanians were killed and expelled in Kosovo before NATO intervention	49	45	44	17	18	20	11	12	14
JNA bombed Dubrovnik	66	57	56	34	30	34	15	15	15
During NATO intervention, Albanians were expelled and had docs. taken away	45	38	36	16	14	15	8	6	10
KLA committed war crimes in 1999		82	77		80	74		78	70
Croatian forces committed war crimes during operation Flash in 1993	85	85	78	82	82	75	75	75	70

The four years of trial thus leave a divided impression. Although they provided a stage for Milošević to promote his interpretation of Yugoslavia's disintegration, his party realized little political gain from this opportunity. At the same time, the trial also appears to have been unable to fundamentally change the perception and recognition of crimes committed by Serb forces during the 1990s. Despite the initial interest the trial commanded in Serbia, it became essentially a side show to the other issues that motivated voters' choices and preferences.

## V. The Death and the Trial: After Milošević, Milošević?

The death of Milošević rendered four years of trial inconclusive and created a new martyr. After his death, the popular nationalist tabloid *Kurir* published a picture of Milošević under the headline "Murdered."<sup>66</sup> This view was echoed in the following days in nationalist tabloids in Serbia, accusing the ICTY of either directly murdering Milošević or indirectly facilitating his death. An article in *Večernje novosti*, for example, reminded readers that 69.56 percent of all prisoners in "the Castle of Death"—that is, the ICTY—were Serbs.<sup>67</sup> The commemoration of Milošević's death briefly appeared to revive the broad and eclectic coalition of supporters his party had been unable to draw upon since its fall from power. Some participants waved flags of Socialist Yugoslavia,

while others carried icons. Speakers described Milošević alternatively as Christian, Serb, socialist, and Yugoslav. In the obituaries, some called him a “great Serb,” others a “dear comrade.” The Radical Party—ascendant heirs to strands of nationalism and social and populist resentment the SPS had long failed to represent effectively—lent the logistical support of its well-oiled campaign machinery. Yet the turnout at the commemoration was a disappointment. In reality, Milošević’s death was not an effective rallying call for political action, but rather an opportunity to close a chapter.

Shortly after his death, conflict broke out within the SPS over Milošević’s heritage and whether to reform the party. This conflict between the “coffin carriers”—the Milošević loyalists who carried his coffin during the funeral—and the “suitcase carriers”—a reference to a corruption scandal involving the reformist Iвица Dačić—ended with a victory for the pragmatists.<sup>68</sup> Just two years after Milošević’s death, the SPS joined its former nemesis, the Democratic Party, in government. Similarly, the Serb Radical Party, in many aspects a more effective heir to Milošević’s policies, broke up in September 2008, with the majority and most of the leadership establishing the *Srpska napredna stranka* (Serb Progressive Party or SNS), which broke with the radical rhetoric of the SRS and seeks to position itself as a (relatively) moderate right-wing party. Does this then mean that, following Milošević’s political defeat in 2000 and death in 2006, his ideas have lost their political currency?

Although his unique combination of socialism with nationalism and the will to use force to pursue this agenda has certainly lost its electoral support, Milošević’s legacy lives on. This legacy is not one of a coherent national ideology (as the Prosecution during the trial sought to demonstrate), but a tension between two political visions: Yugoslavia and a Serb nation-state. The name “Yugoslavia” came to an end in 2003 with the creation of the State Union of Serbia and Montenegro, and three years later Serbia became an independent country, concluding a process that began in the late 1980s. In terms of domestic policies, Milošević’s regime never transformed the country into a nation-state with all the symbolic trappings—a task left to its successors. From the introduction of religious education in schools to new state symbols, the post-2000 governments have emphasized national identity more than Milošević did.

To be sure, the support of the Milošević government for redrawing the borders of Serbia to include Serbs from neighboring republics was more pronounced, at least during the early phases of the wars. The impression that the current nation-state is incomplete is still articulated by nationalist and conservative parties in Serbia, but the desire for national unity is moderated by the unwillingness to engage in open warfare to achieve these goals. This contradictory view is best embodied in the “vision” of the SNS:

The political convergence and economic unity with Republika Srpska presents a realistic policy which will, in the future, in a peaceful manner and respecting the will of the people, create the conditions for the formation of a joint or unified state of the Serbian nation and all other citizens which live on the territory of Serbia and Republika Srpska.<sup>69</sup>

Similarly, the DSS, Koštunica’s party, supports Serbian national unity in its program, even if it also supports the territorial integrity of other states in the region: “Convinced that the programmatic and national goals of our party are identical to the historical aspirations of the Serb nation, wherever it lives, we support its complete cultural, economic and spiritual unity.”<sup>70</sup> Although less clearly articulated by other parties, this embrace of kin state policies that have a strongly territorial understanding of the relationship to Serbs outside the present state is pursued by most political parties in Serbia.\*

In essence, the unresolved tension between the creation of a Serb nation-state and Yugoslavia arose from the decade-long rule of Slobodan Milošević. This legacy would have shaped the uncertainty of statehood in Serbia in the first years after his fall, irrespective of his trial. The trial appears thus not to have significantly altered the dominant discourses in Serbia about the recent past, which in itself could be seen as a success for Milošević. Neither the hopes of transitional justice advocates that the trial would force Serbs to confront the crimes committed by the Milošević regime nor their fears that Milošević’s performance would lead to a nationalist backlash materialized. After his death, many Serbs see Milošević as either a bad leader or a victim, but few share the narrative of the ICTY that he was a war criminal.<sup>71</sup> Although political priorities in Serbia have shifted in the decade since Milošević’s fall from power,



widely held perceptions about the dissolution of Yugoslavia and the wars that followed remain shaped by the narrative of Milošević.

## From Politics to Law, to Tedium, and Back

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*Although it might seem that the Milošević trial had little legal consequence, and limited political effect on Serbs, it actually proved to be of great legal value to Serbia. Notwithstanding its tedium, the trial—and indeed the work of the ICTY more generally—has preserved the dignity of the Serbian nation. By individualizing responsibility—that is, by focusing it on Milošević—the ICTY has helped spare Serbia from collective legal denunciation. Although Milošević relentlessly presented the ICTY as attacking Serbia—a narrative that so many observers have implicitly accepted—the ICTY protected Serbia as well.*

In an elegant contribution, Bieber posits little causality between the Milošević trial and Slobodan Milošević's dénouement. For Bieber, fundamentally, Milošević's political legacy is scant: No significant political party in Serbia carries his mantle. His ideological inheritance is ignored. Milošević's politics failed his fellow citizens, but, ultimately, also proved themselves to be a failure. This is not attributable to international law, according to Bieber, but rather derives from politics. Demographic change, ideological incoherence, and internal conflict gutted Milošević's political party, as well as cognates and allies. Milošević's death was not a call to arms, but—for Bieber—"an opportunity to close a chapter."<sup>1</sup>

The paradox for Bieber is that, when it came to dramatizing his trial, Milošević performed well, at least initially, yet his success “did not translate into increased political support for his party or other parties with a nationalist platform.”<sup>2</sup> His decision to speak in Serbian to Serbia, while the Prosecutors aridly spoke in English legalese to the judges, may have bifurcated the audiences and hobbled the proceedings, but this choice ultimately did not yield any dividends for Milošević.\*

Serbs watched the trial, but quickly became bored. The languid proceedings dragged on for years, after all, in significant part owing to Milošević’s own obfuscation. Yet trials fundamentally are tedious; the infotainment they provide is overrated. Assuredly, some episodic frissons arise—the impeached witness, the spontaneous confession, a rapier cross-examination—but these are few and far between. The solemnity of trial leads to sterility; the machine of procedure crushes vivacity; managerial justice emits manufactured truths; and, once they become fulsome, dilatory tactics distract and divert as much as they delay and postpone. Is it unsurprising, then, that viewer interest soon flagged, and numbers dropped?

In part, Serbs averted their gaze from the trial because, as Bieber wisely notes, Milošević’s narrative was one that hearkened back to a period of “suffering, shortages, and war” for the Serbs themselves—a period of time they would sooner prefer to forget. The televised proceedings may have resonated, but also were beside the point, as they resonated with a chord no one really wished to replay. Milošević’s efforts, then, were hortatory. In a Serbia where “forgetting is stronger than remembering[,]” the trial turned into a “side-show.”<sup>3</sup>

Bieber’s orientation stands in contradistinction to that of Armatta, who spent many days over nearly three years diligently attending Milošević’s trial. In her recently published, encyclopedic chronicle, *Twilight of Impunity*, as in her chapter, she underscores that, despite its imperfections, the trial did matter. In fact, for Armatta “the proceedings against Milosevic accomplished a great deal.”<sup>4</sup>

For Armatta, the central legacies of the *Milošević* trial are not political, but legal: learning from law for the sake of reforming—and ostensibly improving—law itself. In this regard, the *Milošević* trial instructs on the perils of self-representation;<sup>5</sup> warns of excessive coddling

of an accused; reveals the danger in sprawling indictments; and underscores—as a matter of practicality—the need to make sure defendants take their medications properly, smoke less, stop drinking, and are kept from acquiring contraband. In particular, *Twilight of Impunity* unveils the corrosive effects of Milošević’s self-representation: by facilitating Milošević’s serving as his own counsel, the ICTY committed its “most grievous mistake,” thereby enabling him to treat the trial “as a joke.”†

Bieber appears uninterested in legal legacies; his concern is with the political. But it is not clear one must choose: The fact that war crimes trials may offer concrete legal instruction while remaining politically superficial suggests that trials straddle multiple, interstitial, and fluid identities. The obverse also is possible: Legally inconsequential or even flawed trials may offer concrete political instruction and a pedagogy of transition, even transcendence.

Serbs came to see Milošević as a political failure—defined by politics as “either a bad leader or a victim”—but not as a legal transgressor, denounced by law as a war criminal.<sup>6</sup> On the one hand, then, Milošević’s political failure precluded a nationalist backlash. On the other hand, as Bieber points out, the legal effect of the trial was nominal—doing little to push Serbs to “confront the crimes committed by the Milošević regime[.]”<sup>7</sup> Would it have mattered had Milošević’s trial concluded with conviction and sentence, instead of being prematurely halted by the death of the antagonist—or protagonist, as Bieber and other authors have suggested he fleetingly was to many Serbs? Not to sound nihilistic, but probably not. Milošević may have cheated a verdict, but it was a verdict no one cared too much about anyway.

But although this might seem to indicate the *Milošević* trial had little legal consequence, it actually proved to be of great legal value to Serbia. Serbs may have lost interest in Milošević’s trial, but this nonchalance and disengagement is itself an instance of the trial’s efficacy. The trial, and the ICTY generally, offered a golden opportunity to blame Milošević, his cohorts, and a small number of thugs, thereby artfully displacing responsibility from the collective to a handful of individuals. It is true that the Prosecution’s JCE could in theory catch up all Serbs charged by the Tribunal,\* but the real point is just how few they actually are.



Personalizing guilt by laying it on the shoulders of the hundred or so apparently most blameworthy individuals collectivizes the innocence of all others. Yet these others were indispensable to the normalization of Milošević's violence: Voters who supported him, citizens who toasted him, youth who fought for him, families who upgraded their lot because he had uprooted the lives of others, communities who shared his solidarities—but for the support of all of these constituencies, violence would not have been mainstreamed throughout the Balkans. The few who stand accused immunize those who stand below and prop them up. Milošević's braggadocio—his refrain of *l'état (victimisé, affligé) c'est moi*—absolved others of responsibility for their small function in the entrails of a criminal state. And not only are these others absolved, they are themselves excused from further reflection. In fact, as Bieber points out, notwithstanding the spectacularization of the genocide at Srebrenica, Milošević's trial did not actually increase awareness among Serbs about the crimes committed—putatively on their communal behalf—by Serb forces generally.

In an even more direct way, the ICTY's work also helped insulate Serbia from state responsibility before the ICJ, as Shany discusses. Redacted evidence, curial timidity, and liability shopping each conspired in their own way to deflate the ICJ's findings in the *Bosnian Genocide* case and, ultimately, to lead to the most anemic of remedies.

In short, notwithstanding its tedium, the work of the ICTY—whether intentionally or inadvertently—preserved the dignity of the Serbian nation. Milošević may have personified Serbia, but he personalized the blame. The work of the ICTY individualized responsibility and thereby helped spare Serbia from collective denunciation as a matter of law. Although Milošević presented the ICTY as attacking Serbia—a narrative that Bieber and, really, so many observers have implicitly accepted—the ICTY protected it as well.

## PART SIX

### Reanimation

#### DESIGNING TRIALS AND DOING

##### JUSTICE AFTER *MILOŠEVIĆ*

For Milošević, the trial is over; for the rest of us, it lives on. Several of Milošević's codefendants have been convicted or acquitted, while the same crimes and claims alleged in Milošević's trial figure into cases before domestic war crimes courts in the former Yugoslavia. Farther afield, the trials of Saddam Hussein and Charles Taylor have been influenced by the experience of the *Milošević* trial. What role has his terminated trial played, and what role will it play? What legacy and lessons does it hold for the design of justice in other courts and after other conflicts? The final chapters consider what the evidence amassed by the ICTY has been or could be used for, and what the obstacles to its use are, now that the ICTY's own demise is imminent.

## Two Sides of the Same Coin?

Judging Milošević and Serbia before the ICTY and ICJ

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*Milošević's trial before the ICTY was not the only legal procedure in which claims of state-sponsored genocide by Serbia were raised: Similar issues were also raised before the ICJ in the case brought by Bosnia under the Genocide Convention. This chapter examines some of the coordination problems arising in relation with the parallel prosecution of Milošević before the ICTY and the inter-state cases before the ICJ between Bosnia and Serbia. This case study illustrates some of the practical issues that parallel proceedings entail, and, more generally, the tensions between addressing the individual criminal accountability of state officials and establishing inter-state responsibility. Such tensions, if left unaddressed, might complicate both sets of proceedings and weaken their legitimacy in the eyes of key constituencies.*

### **I. Introduction: Two Approaches to Responsibility**

The practice of holding state officials criminally liable under international law has largely developed in reaction to frustration with the practical difficulties of holding states responsible for violating international obligations and with the limited deterrence that the law on state responsibility seems to have generated. Indeed, states, being, as the Nuremberg Tribunal observed, mere “abstract entities[,]”<sup>1</sup> may be less amenable to pressure and punishment than individual leaders, who may fear trial and imprisonment.<sup>2</sup> Thus, efforts to increase the compliance-pull of international norms<sup>3</sup> may support the move toward imposing legal responsibility not only on states that violate international law, but also on those individual leaders who played a key role in orchestrating or executing such violations. According to this line of thought, individual responsibility complements state responsibility and compensates for its shortcoming in preventing and punishing violations of international law.<sup>4</sup> At the same time, state responsibility may address some of the structural limits of individual responsibility, such as the lack of a comprehensive victim compensation scheme, and the inability to prosecute all responsible individuals.\* This complementary view of individual and state responsibility has been expressed in the very cases and by the very institutions considered here.<sup>5</sup> For example, in the *Bosnian Genocide* case, Judge Tomka of the ICJ sounded an optimistic note about the complementary relationship between his court and the ICTY:

The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court’s role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective—the achievement of international justice—however imperfect it may be perceived.<sup>6</sup>

There is, however, another possible explanation for the shift from state to individual responsibility: The growing emphasis on individual responsibility in international law may derive from the increased aversion of states and international organizations to collective forms of legal responsibility.<sup>7</sup> In an age of human rights, where international law is increasingly viewed as a vehicle for enhancing individual welfare, imposing sanctions on a state may be regarded as a crude form of



collective punishment of a particularly large magnitude—punishing millions of citizens whose involvement in the unlawful state policies may have been marginal at best.<sup>8</sup> Imposing individual responsibility, which focuses attention and retribution on those having the “greatest responsibility” for the violation,<sup>9</sup> could thus be viewed as preferable from a normative perspective. So, according to this view, individual responsibility should eventually displace state responsibility.<sup>10</sup>

That may eventually happen, but attempts to introduce legal accountability in the aftermath of wars and mass atrocities reveal the actual difficulty—if not near impossibility—of drawing neat lines of separation between individual and state responsibility.<sup>11</sup> Such distinctions are especially difficult to make when they implicate the personal responsibility of high-level perpetrators, whose acts are closely identified with state policies: Can one really separate the acts of individuals, such as Slobodan Milošević, Augusto Pinochet, or Omar Al-Bashir, from the policies of the states that they head or have headed? Although distinctions between individual and state responsibility continue to be drawn in these cases—international criminal tribunals only have jurisdiction over individuals, whereas inter-state courts, such as the ICJ may only adjudicate state responsibility cases—their legal, political, and moral interconnectedness militates in favor of adopting a more holistic approach toward managing responsibility. In other words, criminal trials of state leaders and state responsibility proceedings can be viewed as two sides of the same coin. Treating them otherwise may not only represent an inefficient utilization of judicial resources (resulting from the existence of separate and uncoordinated fact-finding and law-applying procedures), it might also result in inconsistent outcomes that would erode the legitimacy of the different courts involved in establishing responsibility.

This chapter investigates some of the links between individual criminal trials implicating top leaders and judicial proceedings addressing state responsibility that involve similar facts and legal norms. Using the *Milošević* proceedings before the ICTY and the parallel *Bosnian Genocide* inter-state proceedings before the ICJ as a case study, it examines the *problématique* created by the parallel invocation of individual criminal prosecutions and state responsibility proceedings. Not only are the *Milošević/Bosnian Genocide* cases a good example of such parallelism,

they offer, in fact, the only example we have of a head of state being actually put on trial before an international tribunal while parallel legal proceedings are pending against his state before another international court. The lessons that can be drawn from these parallel proceedings may help us better understand the practical and theoretical issues raised by the simultaneous pursuit of individual and state responsibility over the same set of acts (or omissions) before different adjudicative mechanisms. At a minimum, the *Milošević/Bosnian Genocide* proceedings demonstrate some serious coordination problems between the two sets of procedures, but, at a more fundamental level, they suggest that international courts and other actors concerned with individual and state responsibility should adopt a more comprehensive strategy that takes into consideration difficult choices about the set of interests and values they ought to prioritize. For example, if the international pressure applied on the FRY, and later Serbia, to cooperate with the *Milošević* proceedings before the ICTY has inadvertently come at the expense of the inter-state proceedings against that country before the ICJ and the interests and values those proceedings could serve—compensation to victims, assignment of collective guilt, and so forth—such a course of action should be reconsidered in future cases, or at least, one should be clear about the costs associated with making a choice.

The first part of this chapter surveys the bifurcated and ultimately inconsistent nature of the legal rules governing the attribution of responsibility to the state and those rules that require the investigation and punishment of individual perpetrators of international crimes. Although such tensions nominally exist in all situations where state agents have been involved in international crimes, they are greatest when senior leaders are implicated. This is because acute legal and political tensions are generated by the conflict between the need to impose individual responsibility on the highest-ranking state officials and the state's interest in minimizing its own exposure to legal responsibility over acts and omissions committed by those officials. The second part of the chapter discusses three interactions between individual criminal responsibility and state responsibility proceedings that the *Milošević/Bosnian Genocide* cases have given rise to: the decision of the Serbian government to transfer Milošević to the Tribunal (which set the stage for the simultaneous pursuit of proceedings before the ICTY and ICJ); the

decision by the FRY, and later Serbia,<sup>\*</sup> to make its Supreme Defense Council (VSO) documents available in their entirety to the ICTY but not to the ICJ; and the degree of reliance by the ICJ on evidence presented in the *Milošević* proceedings, including the Trial Chamber's 2004 Rule 98 *bis* decision on the *Amici Curiae*'s motion for a judgment of acquittal. The concluding part of the chapter offers some observations on the problem of coordination that the two proceedings raise and on the need to embrace a more comprehensive strategy for managing international legal responsibility.

## **II. The Uneasy Dichotomy between Individual and State Responsibility**

### **A. The different nature of individual and state responsibility**

Whereas the notion of state responsibility has a long pedigree under international law,<sup>12</sup> the concept of individual responsibility, as applied to state agents, is more recent. To be sure, the concept of individual responsibility and the designation of certain individuals as *hostis humani generis* already existed in Grotius' time.<sup>13</sup> However, this concept was applied, almost by definition, to individuals operating outside the purview of the state apparatus, such as pirates, slave traders, and later, terrorists and drug traffickers.<sup>14</sup> In other words, international criminal law initially focused on crimes of an intrinsically international concern, which were perpetrated by individuals or groups that operated independently of states, typically in areas beyond the latter's reach (such as the open sea or the African *terra nullius*).

This traditional state of affairs underwent a dramatic change in the 20th century. In the aftermath of the two World Wars, attempts were made to put on trial those leaders most responsible for breaching the peace (*jus ad bellum*) and violating the laws of war (*jus in bello*). Efforts to try the German Kaiser and senior Ottoman leaders implicated in the Armenian massacres failed for a variety of legal and political reasons;<sup>15</sup> but the Nuremberg and Tokyo trials addressed the criminal responsibility of the

Nazi and Japanese leadership and removed any immunity that may have resided with their office.<sup>16</sup>

The theory underlying Nuremberg, which still serves as the foundation of modern ICL, is that the traditional focus on state responsibility failed to deal directly with those state agents whose acts, omissions, and decisions actually shape unlawful state policies.<sup>17</sup> The attempt to generate a better fit between moral agency and legal responsibility<sup>18</sup> may be supported by considerations of morality and efficiency: Piercing the veil of state responsibility renders it more difficult for individuals in positions of authority to act with a sense of impunity and lack of moral blameworthiness.<sup>19</sup> In addition, the move to individual responsibility reduces the collateral damage that state responsibility—and the remedies it entails—incurred on innocent citizens of the liable state.

Efficiency arguments supporting individual responsibility have focused mostly on the problem of deterrence. The ability of international actors to enforce monetary or other sanctions against states that violate the law remains quite limited (especially when the targeted states are politically or economically powerful).<sup>20</sup> Even when sanctions are applied, states are hard to deter because they can spread or resist the harm inflicted on them in ways that limit the sanctions' economic and political repercussions.<sup>21</sup> Hence, for many states, the deterrent effects of any sanctions associated with international responsibility are tolerable (though, of course, some states are more sensitive to reputational and economic costs than others).<sup>22</sup> At the same time, individual actors exposed to the risk of deprivation of liberty and property or removal from office may be more vulnerable to international condemnation and sanctioning—that is, they are relatively more likely to be deterred and neutralized by international pressure. Consequently, ICL is arguably more likely to succeed in regulating state conduct by targeting state leaders than general international law is likely to regulate such conduct through pressuring the state *per se*.

This orthodox justification for ICL suffers from a number of serious deficiencies. First, one may question the moral justification for focusing effort and attention primarily on individuals whose actions were executed on behalf of the state—a focus that the Nuremberg principle implies and international practice often accepts. The attribution of responsibility to the



agent (that is, the state official) and not the principal on whose behalf the agent acted (the state) may be viewed as incomplete—and awkward.<sup>23</sup> Moreover, the case against collective responsibility is much weaker when the crimes committed were so systematic in nature as to transform the state into what Hanna Arendt referred to as a “criminal state[.]”<sup>24</sup> Arguably, in situations of widespread criminality the state’s population as a whole can be viewed as an accomplice to, and the primary beneficiary of, the state’s criminal policies; under such conditions, it is state responsibility and not individual responsibility that offers a superior fit between law and morality. Finally, focusing efforts only, or primarily, on holding individuals accountable may ultimately result in the imposition of no responsibility whatsoever, as prosecuting individual offenders may not be feasible, as when senior leaders continue to wield state power as a shield against legal responsibility, or physically flee justice or die. Thus, practical considerations support the pursuit of the state responsibility track, at least as a fallback or alternative to individual criminal responsibility.

In the same vein, the assumption that individual sanctions are more painful than state sanctions, and are thus more likely to deter, is not always true. In fact, states may often be quite content to allow some officials, even past leaders, to become scapegoats on their behalf as a way to deflect or minimize legal responsibility at the inter-state level, and to avoid collective moral reckoning.<sup>25</sup> Furthermore, the view that states can easily absorb international sanctions imposed on them may be exaggerated: Even large states would have difficulties in processing huge monetary awards,<sup>26</sup> not to mention more intrusive remedies (such as loss of territory or even *debellatio*).<sup>27</sup>

In short, there is no reason to assume that individual criminal responsibility is the morally preferable avenue for imposing legal responsibility, at least in cases involving systematic state criminality, nor is it necessarily the most effective deterrent against future violations. Certainly, from a remedial point of view, the state responsibility track offers a much greater potential to mete out compensation to victims,<sup>28</sup> whereas victim satisfaction derived from individual responsibility procedures is mostly symbolic in nature.<sup>29</sup> Each responsibility track may have its advantages and disadvantages. Any international responses to

mass atrocities should, as a result, carefully assess if advancing both individual and state responsibility is feasible, as well as, if a choice between the two tracks must be made—and, as will be shown below, such a choice is sometimes necessary—decide which mechanism should be given right of way.

## **B. The intertwined nature of individual and state responsibility**

Notwithstanding their doctrinal separation and distinct historical origins, the concepts of individual and state responsibility are closely intertwined as a legal and practical matter. This state of affairs often creates tensions between the two responsibility tracks and sometimes invites a pragmatic choice as to which of the two parallel tracks should be pursued. Most significantly, under the accepted doctrine of state responsibility, conduct attributable to any state organ—that is, to any state official—can generate international responsibility for the state.<sup>30</sup> This is true even in cases in which the official has overstepped his authority and acted without the support of higher ranks in the state bureaucracy.<sup>31</sup> So, the very commission of an international crime by a state official would, in the normal course of events, automatically generate legal responsibility for the state in question (on top of the individual responsibility that can be assigned to that official).<sup>32</sup> In addition, a number of international instruments proscribing international crimes—including the Geneva, Torture, and Genocide Conventions—require states to prevent and punish crimes committed by individuals situated within its territory, including its own state officials.<sup>33</sup> Failure to address international crimes and punish their perpetrators may therefore constitute an independent basis for designating state responsibility.

The problem is, of course, that states are unlikely to seriously investigate and establish the criminality of acts or omissions committed by their own officials, when such a course of action would automatically generate legal responsibility with harsh consequences. Thus, the wish to minimize exposure to state responsibility may be one reason (among several) for the poor record of states in complying with their numerous obligations *aut dedere aut judicare* (to either extradite or prosecute) under international law. Moreover, the ICJ's *Bosnian Genocide* judgment

suggests that violations of secondary norms attendant on international crimes—that is, violations of the obligation “to prevent and punish” international crimes<sup>34</sup>—may be considerably less costly for the state than violations of its obligation not to infringe the primary norm against committing international crimes or having them committed on its behalf. The ICJ held that the violation by FRY/Serbia of its obligation to cooperate in the arrest and transfer of international criminals suspected of genocide does not entail monetary compensation;<sup>35</sup> it is unlikely that the Court would have reached the same result had it concluded that FRY/Serbia directly committed genocide.

The tension between state responsibility and individual responsibility is perhaps most pronounced in cases implicating the highest leadership of the state. Although from a doctrinal perspective high and low officials are equally capable of generating state responsibility through attribution,<sup>36</sup> the reputational harm caused to the state by unlawful acts of low-ranking “rotten apples” may be considerably smaller than in cases implicating the highest echelons of power. In the same vein, the nature of the remedies prescribed in situations implicating low-level and high-level officials may also be dramatically different.<sup>37</sup> The close identification between high-level officials and state policies may imply that the state itself is on trial whenever its high leaders are indicted—a perception that explains the considerable political resistance states often mount against such proceedings.\*

Moreover, for some international crimes—most notably genocide—the existence of a criminal state policy may constitute one of the elements of the crime (or at least a relevant factor in the decision to prosecute it).† For such a state policy to emerge, the support of the highest leaders of the state—their individual criminal responsibility—must be shown. The UN Fact Finding Committee on Darfur, for instance, was of the view that it would be difficult to classify the situation in Darfur as genocide without proving the existence of a genocidal plan embraced by Sudan’s leaders.<sup>38</sup> At the same time, the initiation of criminal proceedings by the ICC Prosecutor against the Sudanese President, Omar Al-Bashir, which include genocide charges, could affect the legal responsibility of the Sudan.<sup>39</sup>

Although the higher legal and political stakes involved in prosecuting leaders would normally cause states to refuse to investigate or charge



them with crimes (or to reject cooperation with international efforts to do so), there could be exceptional cases in which elements within the state apparatus may have their independent reasons to support putting current or former leaders on trial before an international criminal court. In certain transitional situations for instance, the internal political dynamics in the state may support international prosecution of the former leadership as a method for delegitimizing the old regime's policies;<sup>40</sup> the new leadership may even have an interest in advancing international criminal proceedings as a method for physically removing its predecessors from the country or region—as happened with Charles Taylor<sup>41</sup> and, as we shall shortly turn to, with Milošević. Moreover, the diplomatic and economic benefits attained from cooperating with international tribunals could offset some of the costs associated with the increased legal and political risks that criminal proceedings against state leaders may entail.<sup>42</sup>

Still, even when some incentives to cooperate with international criminal proceedings exist, the state may attempt to minimize its legal exposure to subsequent state responsibility claims, by subjecting its cooperation with international courts to certain conditions. In fact, in transitional situations, it is precisely because of the recent change of regime that the state may challenge the propriety of assigning to it responsibility for the crimes of the old regime. Thus it has sometimes been argued that requiring the state to pay reparations for crimes committed by an ousted regime is unfair, as it punishes the population which itself was a victim of the former regime; additionally, holding the state legally accountable for past violations of international law could unnecessarily complicate the ongoing process of transition.<sup>43</sup>

In sum, the relationship between individual and state responsibility is fraught with difficulty, and often entails tough political choices; furthermore, the conflict of interest between the state's duty to investigate, prosecute, or extradite officials who have committed international criminals, and its wish to shield itself from state responsibility, is particularly serious when the alleged crimes implicate heads of state or other high-ranking leaders. In light of the limited capabilities of international actors for holding recalcitrant states accountable, there will be times in which only one track of responsibility could be realistically promoted. Still, the specific conditions in the state concerned and the



specific interests of relevant international actors (as well as other political considerations) may under certain circumstances create windows of opportunity for advancing one or more avenues of accountability. The next section explores how one such window that opened in Yugoslavia after Milošević's fall from power has been used by the ICTY and the ICJ.

### **III. The *Milošević* Case Study**

The reaction of the FRY and Serbian authorities to the prosecution of *Milošević* before the ICTY serves as a particularly useful case study for examining the actual interplay between individual and state responsibility. This is because the *Milošević* case is the only instance in which international legal proceedings were simultaneously pending against a state and its previous leader over the same set of events. Moreover, some of the conduct of the FRY authorities in *Milošević* was heavily influenced by strategic calculations relating to the *Bosnian Genocide* case before the ICJ, which has been pending against Serbia since 1993 (and, to a lesser extent, by the parallel ICJ case brought against the FRY by Croatia in 1999).<sup>44</sup> As both the ICJ and ICTY proceedings revolved to a large degree around Milošević's involvement in the dramatic events that took place in Bosnia and Croatia, it is not surprising that the FRY leadership at times viewed the different sets of cases as intertwined.

#### **A. The decision to transfer Milošević**

The first important decision the post-Milošević authorities in Belgrade had to adopt following the regime change in October 2000 was whether to accede to the ICTY Prosecutor's demand to transfer Milošević to The Hague to face criminal charges.\* Although this decision does not appear at first glance to have a direct relationship to the already-pending ICJ proceedings against the FRY, it is possible that decision makers in Belgrade were concerned that facilitating the criminal proceedings against Milošević through his transfer to the Tribunal would eventually lead to revelations about the involvement of the Serbian leadership in the Balkan war atrocities that could, in turn, undermine the FRY's ICJ cases. Furthermore, the events surrounding the decision to transfer Milošević

illustrate how exceptional political circumstances may facilitate the cooperation of the relevant state authorities with one responsibility track (individual criminal responsibility before the ICTY), while they remain uncooperative vis-à-vis the other responsibility track (state responsibility proceedings before the ICJ). In such circumstances, international courts, international organizations, and third states may face a choice as to whether to acquiesce or challenge such a policy of selective cooperation with international accountability mechanisms.

The initial reaction of the new President of the FRY, Vojislav Koštunica, to the demand to transfer Milošević was wholly negative:

“It should never happen,” Mr. Kostunica said in an interview [with the New York Times]. “I think that it’s possible to do everything so that it should never happen....” Mr. Kostunica said he also supported a draft law on cooperation with the tribunal that would allow the extradition of those indicted, both Yugoslav citizens and non-citizens, after a rapid judicial procedure. But the case of a former president is different, Mr. Kostunica argued... “It’s not legitimate,” Mr. Kostunica said. “Other presidents are not being sent to The Hague. I must make some compromises, but there is a line I cannot cross. Even among those people in the Serbian and Yugoslav governments who don’t think about legitimacy but about what might be politically useful, the prevailing view is that it would be unacceptable.”<sup>45</sup>

Although Koštunica’s reluctance to transfer Milošević may have been dictated in part by his own conservative politics,<sup>46</sup> his position may also be supported on more principled grounds. The drawing of a uncrossable line between transfer of lower-ranking Serb suspects and the transfer of Milošević illustrates the qualitatively different political calculus associated with trying a current or former head of state. Indeed, many Serbs viewed the trial of their former leader before the ICTY as a form of “national humiliation”<sup>47</sup> and thus illegitimate. As Koštunica did appear to support, at least publicly, the prosecution of Milošević before Serbian courts,<sup>48</sup> his reluctance to transfer Milošević to the Tribunal appeared to derive less from any pro-Milošević sentiment, and more from the need to defend his government coalition from the political fallout that transferring Milošević would have precipitated.\* Although there is no direct evidence that the ICJ proceedings were part of the calculus in Belgrade in early 2001, the same logic that led Koštunica’s government to withhold cooperation with the ICTY for reasons related to the ICJ proceedings (see

the immediately following section), may have affected Koštunica's position on the question of transfer as well.

In any event, the Serbian government, headed by Zoran Đinđić, had different plans from those espoused by the federal government, and on 28 June 2001 it decided to transfer Milošević to the Tribunal.<sup>\*</sup> Although Đinđić's determination to transfer Milošević<sup>49</sup> may have been partly based on his personal conviction that this was the "right thing to do,"<sup>50</sup> the decision also appears to have been supported by a sheer political calculation that the kind of reforms Đinđić sought (probably over the objections of his more conservative partner and archrival Koštunica) would be difficult to pursue in the shadow of Milošević.<sup>51</sup> An additional consideration Đinđić may have taken into account was the political advantage that he could gain by exposing the criminal policies of the Milošević regime and using it to discredit the more nationalistic and conservative elements in the post-Milošević order (including Koštunica). Finally, the United States (acting at the request of the ICTY Prosecutor) was exerting direct pressure on Belgrade to surrender Milošević, by conditioning economic aid for Serbia on cooperation with the ICTY.<sup>52</sup> Such pressure may have partially offset, at least for Đinđić (who generally embraced more pro-Western positions than did Koštunica), the adverse political and legal implications that Milošević's trial would have had for Serbian government.

In short, a unique set of factors—most notably transitional instability, an ongoing power struggle among the new leaders and focused international pressure—facilitated Milošević's transfer. (These factors did not lead in the immediately following years to a much improved level of cooperation between the FRY/Serbia and the ICTY in other areas, however).<sup>53</sup> The transfer allowed individual proceedings against Milošević to take place, but this, in turn, made the FRY's task of defending the ICJ claims brought against it by Bosnia and Croatia much more difficult and complicated. As both inter-state claims were largely based on the theory that genocidal policies were adopted or approved by the senior Belgrade leadership during the wars in the Balkans, were the ICTY to find Milošević responsible for genocide in Bosnia or Croatia, it almost goes without saying that the ICJ cases (which are governed by more a flexible burden of proof than the ICTY),<sup>54</sup> would be lost for the FRY as well.<sup>†</sup>

From an international relations perspective, the lesson that can be drawn from the transfer of Milošević to the Tribunal may be that a robust combination of carrots and sticks can lead states to cooperate in establishing the individual criminal responsibility of its former leaders, even at the cost of assuming some increased legal exposure at the inter-state level. However, success in initiating a criminal process against an individual does not mean that the relevant state's incentives to protect itself from political and legal fallout have disappeared. As the next section shows, Serbia continued to defend its political and legal interests by containing the potential damage the trial could cause through restrictive evidence disclosure policies. Equally important, Serbia's strategy was largely successful, suggesting that when the factors that render international pressure effective in a given point in time disappear (either as the result of greater internal stability, or loss of interest or determination on the part of relevant members of the international community), the international community's ability to sustain a dual track approach that simultaneously advances individual and state responsibility may no longer exist.

## **B. The Supreme Defense Council documents**

The parallel existence of the proceedings against Milošević before the ICTY and the FRY before the ICJ, and the close factual and legal relationship between the underlying individual and state responsibility claims, generated a new conflict of interests for the FRY authorities: Assisting the ICTY Prosecution in collecting evidence against Milošević could undermine the FRY's litigation strategy in the ICJ cases, but refusing to cooperate would have negative diplomatic and economic repercussions for the FRY. This in turn created a coordination problem for the two courts and for the FRY, who was implicated, in effect, in both sets of proceedings.

The most notable example of the coordination problem that existed between the ICTY's *Milošević* proceedings and the ICJ's *Bosnia Genocide* case involved legal attempts to obtain and use the documents of the VSO minutes from meetings involving high-ranking FRY leaders that took place during the wars, and in which the national security policies of the FRY were discussed and decided. These documents were identified by the



Prosecution as critical for establishing Milošević's personal involvement in the genocidal policies of the RS,<sup>55</sup> and were subsequently sought by Bosnia to establish the FRY's state responsibility for the same acts. The FRY authorities, however, refused to surrender the documents to either court, citing concerns that "state secrets" may be revealed.<sup>56</sup> Ultimately, bowing to strong pressure from the ICTY,<sup>\*</sup> the FRY agreed to produce the requested documents, but concomitantly applied for "protective measures" that would keep out of the public view—and out of the reach of the Bosnian legal team—portions of the documents whose publication would allegedly compromise national security. The Prosecution agreed to support of the motion,<sup>57</sup> indicating that a deal had been struck: The Prosecution would get the critical portions of the documents, but for its use only. The requested protective measures were authorized by the Trial Chamber in an unpublished decision issued on 5 June 2003.<sup>58</sup>

Some commentators have questioned whether the redacted parts of the documents genuinely pertained to the FRY's "national security" interests, as opposed to its litigation interests in the *Bosnian Genocide* case.<sup>59</sup> Similar doubts were also reportedly expressed in confidential proceedings that took place before the ICTY Appeals Chamber in which the scope of protective measures were challenged; still, the Chamber refrained from annulling the protective measures, citing, allegedly, the unfairness associated with upsetting the FRY's legitimate expectations in the matter.<sup>60</sup>

In the *Bosnian Genocide* case before the ICJ, the FRY produced only a redacted version of the VSO documents. According to the FRY's agent, Saša Obradović, "[t]he redacted sections were classified by the Supreme Defense Council as a military secret and, according to the Confidential Decision of the Council of Ministries of Serbia and Montenegro, as a matter of national security interest."<sup>61</sup> Surprisingly, the ICJ neither insisted on the production of the non-redacted parts of the documents<sup>62</sup> nor did it draw an adverse inference against the FRY on that account (although it noted that it could have done so).<sup>63</sup> Instead, in its 2007 judgment, the Court suggested that sufficient evidence was presented before it without the VSO documents.<sup>64</sup> This statement is hard to reconcile, however, with the Court's conclusion that evidence showing

Serbia's direct involvement in genocide was lacking.<sup>65</sup> after all, without seeing the redacted portions, how could the Court know they did *not* support Bosnia's claim that Serbia committed genocide?

The FRY's refusal to submit to the ICJ the redacted portions of the VSO documents—which the ICTY Prosecution regarded as a key piece of evidence for convicting Milošević of genocide and which the FRY Foreign Minister reportedly considered to be “catastrophic” for his country's ICJ case<sup>66</sup>—may have deprived Bosnia of an opportunity to establish the extent to which the FRY supported the crimes committed by the VRS during the war in Bosnia and contributed to the ICJ's decision to find Serbia not directly responsible for the commission of genocide in Bosnia.<sup>67</sup> Indeed, Del Ponte (who has been privy to the unredacted parts of the VSO documents) believes that the failure to reveal the VSO documents led to a miscarriage of justice in the ICJ *Bosnian Genocide* proceedings:

I was dumbfounded. The truth, I knew, had not been served. From the spring of 2003 onward, the Office of the Prosecutor had obtained hundreds of secret documents, including minutes of wartime meetings of Yugoslavia's political and military leaders, that provided clear evidence of Serbia's role in the Bosnian war. Serbia had obtained the Yugoslavia Tribunal's approval to keep sections of these records out of the public eye, and, more importantly, out of sight of the judges of the International Court of Justice. These judges might have taken a different decision had they pressed for access to the full Supreme Defense Council records.<sup>68</sup>

This episode illustrates the close interdependence between the evidentiary bases relevant to the two proceedings: The *Milošević* trial, with its focus on establishing the general state policies decided upon by the highest levels of government in the FRY, could have provided crucial support to Bosnia's ICJ case, which hinged on establishing these same state policies. Unlike other trials before the ICTY of lower-ranking Serb officials, which may have revealed some pieces of the puzzle relating to specific Serb policies in Bosnia, the evidence produced in the *Milošević* case, including the VSO documents, could have placed these individual acts and omissions within a broader context and presented a more complete picture of Serbia's war-related policies across time and space, so as to allow the ICJ judges to rule on whether these policies were, fully or partially, genocidal in nature.

The principal lessons to be drawn from the tension surrounding the production of the VSO documents before the ICTY and ICJ appear to be twofold. First, the parallel pendency of inter-state proceedings may hamper evidence production in criminal proceedings directed against senior officials and vice versa. This is because parallel proceeding situations create structural disincentives for states to cooperate with one set of proceedings, if such cooperation would compromise their litigation interests in the other set of proceedings. At the same time, each of the courts may have a structural incentive to offer states to cut a deal and obtain information on a confidential basis. Hence, some coordination or even sequencing of the two proceedings may be necessary. Although the precise sequencing ought to be determined on a case-by-case basis (and would depend, *inter alia*, on the availability of custody over individual defendants), it seems that the more robust fact-finding facilities of international criminal tribunals would usually render them better suited to be accorded the right of way, so as to enable state responsibility proceedings, before courts such as the ICJ, to heavily rely on the evidence they gather.<sup>69</sup> Indeed, as the next section illustrates, the ICJ made extensive use in the *Bosnian Genocide* case of facts established by the ICTY. Still, we will also see that the ICJ could have better handled the problems created as a result of the interplay between the structural incentives and disincentives that led to the non-submission of the redacted parts of the VSO documents in the ICJ proceedings.

Second, coordinating the relationship between courts addressing individual and state responsibility requires close attention to reconciling their institutional interests. Prioritization the interests of one court may cause harmful effects on the other, if there are no checks on the priority institution's tendency to engage in self-interested dealing with states. Thus, the decision taken by the ICTY to issue protective measures for the VSO documents and not to insist on their full disclosure implied that the ICTY prioritized its own institutional interest in conducting individual responsibility proceedings in the most effective manner, over the interests and values that could have been vindicated by the parallel state responsibility proceedings (most notably, the ability of the Bosnian state and Bosnian victims to obtain reparations from the FRY). On this point, the ICTY and the FRY's interests happily coincided. However, the decision to issue protective measures also exacted costs from the ICTY itself: It



adversely affected the transparency of the proceedings; suggested that the ICTY became complicit in Belgrade's attempts to derail the ICJ proceedings by withholding from it crucial information;<sup>70</sup> and hindered, through restricting access to background information on Milošević's guilt or innocence, the Tribunal's role in establishing the truth.

Still, in the end, the ICTY's decision to issue protective measures appears to be defensible. Prioritizing the needs of the *Milošević* trial comports with the ICTY's core mandate to conduct criminal trials, and without a high degree of cooperation from Belgrade, which the protective measures secured, the Tribunal's ability to effectively conduct the *Milošević* proceedings (as well as other trials) might have been seriously compromised.<sup>71</sup> Arguably, had the Court insisted on the full disclosure of the VSO documents in order to facilitate the operations of other international accountability mechanisms, it would have risked a return to the policy of noncooperation with the ICTY. This suggests that limits on the transferability of evidence from one responsibility procedure to the other may need to be accepted as a necessary evil in order to prevent the blockage of both responsibility tracks.

Furthermore, criticism of the ICTY's deal with Serbia misses the point: More troubling than the ICTY's acceptance of protective measures is the ICJ's acquiescence in the FRY's limited disclosure policy. The ICTY acted in its own institutional interest; nothing prevented the ICJ from doing the same. The ICTY arrangement only prevented the ICJ from getting the ICTY's *copy* of the VSO documents, the originals of which were still in Belgrade; the ICJ could have ordered the FRY to disclose the redacted portions of the VSO documents directly (with or without full public disclosure). Such an order, backed by a credible threat of drawing adverse findings from refusal to disclose, might have helped the Court to arrive at a fuller view of facts of the case (and certainly would have improved the transparency of its judgment).<sup>72</sup> The same institutional logic that has led the ICTY to press for submission of the redacted portions of the VSO documents should have pushed the ICJ to move in the same direction. This is all the more true as the ICJ judgment was issued in 2007, long after the *Milošević* proceedings had ended, and after any putative need to sacrifice the interests of one proceeding in favor of the other through selective evidence disclosure had already expired.



### C. Reliance by the ICJ on the *Milošević* proceedings

The interplay between individual and state responsibility cases will be most pronounced when the record of one set of proceedings explicitly relies upon the other. However, the premature death of Milošević prevented the ICTY from rendering a final judgment on his individual responsibility for genocide, on which the subsequent ICJ judgment might have relied. Still, the ICJ's reliance on evidence presented in the *Milošević* proceedings throughout its judgment in *Bosnian Genocide*, as well as the its refusal to accord significant weight to the *Milošević* Trial Chamber's Rule 98bis Decision rejecting a motion for judgment of acquittal, lend themselves to some general observations on the relationship between first-in-time individual responsibility and the subsequent state responsibility proceedings. In particular, there are practical advantages in affording international criminal tribunals with the right of way over inter-state proceedings, in light of their superior fact-finding facilities, but at the same time, deference to the first-in-time court should not override the different interests, values, and procedures associated with each set of proceedings. In other words, it is important that sequencing of procedures, although necessary as a practical matter, would not overly constrain the choice available to the second-in-time court.

The *Milošević* proceedings are cited in the *Bosnian Genocide* judgment for a number of purposes. First, they are used to sustain the *actus reus* of specific murders, instances of maltreatment, and the deliberate destruction of cultural property in Bosnia.<sup>73</sup> Second, they are invoked in the discussion of the question of pattern—that is, whether the multiple attacks on non-Serbs in Bosnia constituted part of a single campaign. And finally, the *Milošević* proceedings are considered in discussing the mental state of the authorities in Belgrade. In this latter regard, the ICJ noted the absence of an “official statement of aims” reflecting a genocidal policy,<sup>74</sup> but examined some of the evidence presented in the *Milošević* trial (other than the redacted parts of the VSO documents, of course), including transcripts of intercepted communications between Milošević and Karadžić, in order to ascertain whether an overall plan to commit genocide could be identified.

Here, the unique roles Milošević and Karadžić fulfilled, as heads of states or state-like entities, in establishing state responsibility becomes

apparent: Criminal plans espoused by heads of state, representing the central nervous system of the state, provide a critical organizational context that may give a whole different legal meaning to the crimes perpetrated by their subordinates.\* Trials of low-level perpetrators may project a distorting picture of the overall responsibility of their state (and, as a result, acquittals of such perpetrators may have limited relevance for assessing state responsibility).<sup>75</sup>

Ultimately, the ICJ refrained from qualifying the campaign of violence in Bosnia orchestrated by the RS and supported by Belgrade as genocidal in nature, with the exception of the massacre at Srebrenica, and refused to infer genocidal intent from the wide incidence of killings and other atrocities across time and space.<sup>76</sup> In reaching this conclusion, the ICJ relied on earlier ICTY case law in which certain factual and legal assertions offered by the Prosecution were rejected. In particular, the ICJ noted that the ICTY did not regard the “Decision on the Strategic Goals of the Serbian People In Bosnia and Herzegovina”—the only document on the record laying down the strategic goals of Republika Srpska during the conflict—as reflective of a genocidal intent;<sup>77</sup> in addition, in determining that no genocide had occurred outside Srebrenica, the ICJ noted that all indictments before the ICTY charging genocide in places other than Srebrenica had been dropped or had not led to conviction.<sup>78</sup> Hence, although the ICJ was nominally capable of assigning state responsibility for genocide even in the absence of individual criminal convictions for the same events,<sup>79</sup> in effect it adopted a wholly deferential standard toward the ICTY and found the *dolus specialis* required for genocide to exist only with respect to the massacre at Srebrenica—the only situation for which the ICTY has also rendered genocide convictions.

The treatment of ICTY cases by the ICJ in *Bosnian Genocide* underscores the advantages and disadvantages of sequencing individual and state responsibility proceedings in a manner that allows international criminal courts, with their superior fact-finding facilities,<sup>80</sup> to take a first bite at the apple: The ICJ’s conclusions that a genocide had occurred in Srebrenica derive their legitimacy, to a large extent, from the meticulous fact-finding endeavor performed by the ICTY (an endeavor which the ICJ could not have engaged in); at the same time, the inability of the ICTY to establish that atrocities beyond Srebrenica amounted to genocide appears

to have had the effect of constraining the ICJ's ability to view the Serb campaign in Bosnia, in its entirety, as genocidal in nature. What is more, the ICJ's nearly total deference to the ICTY on matters of fact is open to criticism given the lower burden of proof governing inter-state proceedings<sup>81</sup> and the very limited probative value of the ICTY Prosecution's case management choices concerning the scope of individual charges—in particular, its decision to plea bargain or waive genocide charges for trial efficiency reasons should have had little impact on fact-finding before the ICJ.<sup>82</sup>

But even with respect to the Srebrenica massacre—the one event the ICTY did identify as genocidal in nature—the ICJ appeared to allow Serbia to enjoy the benefit of the doubt in the absence of clear evidence directly linking Milošević to the relevant killings. The Court noted Milošević's contention that “he did not have control over the matter”<sup>83</sup> and added that

[t]he other evidence on which the Applicant [Bosnia] relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale... It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.<sup>84</sup>

In addition, the ICJ found it was not conclusively shown that “the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken.”<sup>85</sup> Finally, although the Court held that the FRY violated its obligation to prevent and punish genocide, no causal nexus was established between that failure and the Srebrenica genocide. Hence, Serbia was found to be under no duty to pay reparations to the genocide's victims.<sup>86</sup>

Problematic and riddled with logical inconsistencies as the ICJ judgment in *Bosnian Genocide* may be, the analysis offered by the Court illustrates the centrality of the evidence about Milošević's personal involvement to Bosnia's genocide claim against the FRY.<sup>87</sup> The judgment also underscores the possibility that the VSO documents could have provided the Court with a smoking gun, which might have enabled it to impute direct responsibility to Serbia (a possibility supported by the statements by Del Ponte and others mentioned above),<sup>88</sup> or at least ground



its decision on a clearer and more complete record. Thus, the ICJ judgment ultimately validates the FRY strategy of resisting, with all of its might, the disclosure of the redacted portions of these documents. The judgment also demonstrates the extent of the setback that Bosnia's case may have suffered as the result of Milošević's untimely death. Indeed, it would have been extremely difficult for the ICJ to absolve Serbia from direct responsibility for genocide had the ICTY convicted Milošević for genocide.<sup>89</sup> (At the same time, as Waters also points out, an acquittal of *Milošević* from the genocide charges would have made it even harder for the ICJ to reach a different outcome, given the deference it afforded to the ICTY's conclusions).

Still, Milošević's death, though it terminated his trial, did not render the entire trial process nugatory, and one may express doubts over the soundness of the ICJ's refusal to accord any probative weight to the ICTY's 2004 Rule 98*bis* Decision on the *Amici Curiae*'s motion for judgment of acquittal. In the Decision, which Waters and Nielsen discuss at length elsewhere in this book, the Tribunal found that the Prosecution had made a *prima facie* case that could lead a reasonable trier of fact to convict Milošević for genocide because of his participation in the crimes committed in Bosnia as part of a JCE, as an accomplice to the crimes, or under the doctrine of command responsibility.<sup>90</sup> Although the Decision certainly did not constitute a final judgment on Milošević's individual responsibility, at over 140 pages it did engage in a long and careful analysis of the evidence presented against him. Thus the finding by the Trial Chamber that a reasonable court of fact could establish guilt beyond reasonable doubt on the basis of the Prosecution's case (although, the test the Chamber applied took the Prosecution case at its highest), suggests that, at least when the Decision was issued, it was plausible to expect that Milošević might be found responsible for genocide—and thus Serbia might as well. Moreover, for the purposes of the ICTY proceedings, the upshot of the decision was the *de facto* reversal of the burden of production from the Prosecution to the Defense; arguably, the Decision should have generated a similar effect two years later in the *Bosnian Genocide* proceedings—a reversal of the burden of evidence production that would have required Serbia to provide evidence establishing that its and the FRY's leadership had not possessed a genocidal *dolus specialis* or was unaware of the *dolus specialis* of the Bosnian Serb leadership.<sup>91</sup>



This last conclusion appears particularly apt given the lower standards of proof in ICJ proceedings. The Trial Chamber's Decision implicitly considered whether the Prosecution had plausibly presented a case that could meet the standard for a criminal conviction, but before the ICJ—even in inter-state cases involving serious allegations, such as the *Bosnian Genocide* case—proof of legal responsibility is based on a “fully conclusive evidence” standard, a standard higher than a mere “balance of probabilities” applicable in other ICJ cases, but lower than the “beyond reasonable doubt” standards of proof required to establish individual criminal responsibility.<sup>92</sup> The ICJ's refusal to consider the judicial findings of the ICTY in the motion for judgment of acquittal because the Decision was not based on a “beyond reasonable doubt” standard appears misplaced.<sup>93</sup> Thus, the ICJ could have arguably made greater use of the sequencing of the two proceedings, taking greater advantage of the ICTY's vastly larger store of evidence, and attributed some probative value to the inconclusive, but not meaningless, factual findings adopted by the ICTY in the Decision.<sup>94</sup>

## **IV. Conclusions: The Need for More Robust Coordination in Managing Responsibility**

Individual responsibility and state responsibility are often intertwined concepts, which are nonetheless in tension with one another: They protect, at times, different values and interests, and the advancement of one responsibility track may adversely impact the other. Such conflicts may be particularly pronounced in cases involving the individual responsibility of senior leaders and, by implication, “criminal” state policies. Although international law generally supports, at least at this time, the complementary application of individual and state responsibility, actual state practice often shows that the wish to limit state exposure to legal responsibility complicates the ability to conduct individual responsibility trials, or even renders such trials impossible. Furthermore, gaining the cooperation of states implicated in responsibility proceedings often consumes considerable time and resources: The affected state is often fighting to protect core interests, whereas other actors may have only a

marginal or abstract interest in the matter. Thus the attention span and determination of international actors may suffice to pursue only one responsibility track, and a choice between the two tracks sometimes needs to be made. Again, senior leader trials present unique challenges in this respect, as they generally reach closer to core state policies and predictably provoke greater local resistance against attempts to institute either kind of responsibility proceeding.

At the same time, the *Milošević* case study confirms that there could be unique situations, characterized by transitional political moments and exceptionally high international interest, where windows of opportunities open for the pursuit of legal responsibility. Such windows may allow the initiation of individual and state responsibility proceedings with the cooperation of the relevant states. However, the same case study suggests that, given the strong tension between the two responsibility tracks in cases involving top leaders such as Milošević, it is more likely that a choice between the two tracks will present itself sooner or later. Indeed, the ICTY's decision to issue protective measures and conceal the contents of the VSO documents represents just such a choice. The ICJ's failure to take full advantage of the sequencing of the ICTY and ICJ procedures—that is, to press for submission of the redacted parts or draw adverse inference from their nondisclosure, or to rely on the interim Decision in *Milošević*—perpetuated the initial choice made by the ICTY, leaving both responsibility options under-realized after Milošević's premature death.

At the end of the day, the international community of states and institutions would be better served by adopting a comprehensive approach toward the imposition of individual and state responsibility: Although one can defend the decision to initially invest international political and economic capital in the *Milošević* proceedings (reflected in European and U.S. pressure on the FRY to transfer Milošević to the ICTY and cooperate with its proceedings)—as the criminal proceedings against Milošević were key to both responsibility processes—the lack of attempts by the ICJ and other international actors to pressure the FRY to fully disclose materials relevant to the state responsibility proceedings is disappointing. Most disturbingly, it not only suggests that the international community prefers at times to allow post-conflict states to move forward in the name of pragmatism (rather than to dwell on contentious historic events), it also reflects that same community's limited interest in satisfying the needs of

the victims of war. It is instructive, perhaps, to note that whereas aid to the FRY was conditioned on the transfer of Milošević to ICTY, no similar linkage was made by international organizations or any influential state with respect to disclosing the VSO documents before the ICJ or on payment of reparations to survivors of the genocide in Bosnia.

In sum, the *Milošević/Bosnian Genocide* proceedings reveal the lack of a principled approach to dealing simultaneously, or even consecutively, with the judicial determination of individual and state responsibility in cases involving the highest state officials. Unfortunately, given the lack of a shared international vision of the contours of assigning legal responsibility for “criminal” state policies, and in light of the fragmentation of norms and institutions dealing with the question, the haphazard and even conflicting treatment of individual and state responsibility cases is likely to continue.

## Ambiguous Choices in the Trials of Milošević's Serbia

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*One of the dreams of the opposition to Milošević's rule was the establishment of the rule of law. Milošević did wind up facing justice, but the way this happened raises questions about whether it indeed contributed to the rule of law. First, Milošević's transfer to the Tribunal relied on a dubious constitutional provision that itself undermined respect for the legal process. Second, the controversy over the Supreme Defense Council minutes, which were never considered in the Bosnian Genocide case before the ICJ, is premised on a speculative belief in those documents' transformative potential for the case and, implicitly, for the country; in fact, the reasons the documents were withheld are likely much more conventional. Such speculation demonstrates both the momentous nature of the question at issue in these two cases, and the degree to which the termination of the Milošević trial left behind it an ambiguous and unresolved legacy. Finally, in the specific circumstances of the Yugoslav conflicts, pursuing legal disputes against states, as in the ICJ Genocide cases, was neither logical nor purposeful. The idea that state-centered legal processes can adequately represent conflicts fought along ethnic lines asks too much of the law, and conceals too much about those*



*conflicts. Certainly, in the ICJ cases spawned by the Yugoslav conflict, juxtaposing newly emerged, multiethnic states as parties to legal disputes was not sustainable. The actual countries that underwent these wrenching conflicts were, and are, complex; treating them as unitary legal subjects simply masks their internal ambiguities and the choices those imply for law and politics.*

## **I. Rule of Law or Justice: The Decision to Transfer Milošević**

During the years of Milošević's rule, one of the dreams of the opposition was the establishment of the rule of law. At that time there was no better metaphor for this than seeing Milošević stand trial; we thought that if Milošević faced justice, this would mark a triumph of the rule of law. Nor was it only a metaphor: In times of transition, it is extremely important to establish a firm foothold in the rule of law.

Milošević did wind up facing justice, of course, but the way this happened opens the question if this was, indeed, a confirmation of the rule of law. Shany's chapter points out some of the intricacies of the situation: Many Serbs viewed the transfer of Milošević (instead of holding proceedings in Serbia) as a "national humiliation."<sup>1</sup> It is also true, however, that many others wanted to send Milošević to The Hague, and wanted this to be a symbol of a clear turn toward the rule of law. It was not easy to reconcile the two.

Indeed, Professor Grubač, who became the first federal Minister of Justice in the post-Milošević era, has written about the quandaries he faced concerning the transfer.<sup>2</sup> The international obligation of the FRY to cooperate with the ICTY was clear, but it was less clear if it was possible to proceed—as the ICTY insisted—without implementing legislation.<sup>3</sup> Furthermore, the Constitution of the FRY, enacted in 1992, prohibited extradition of citizens,<sup>4</sup> and the Yugoslav Code of Criminal Procedure made this prohibition even more explicit.<sup>5</sup>

What Minister Grubač wanted was a federal legislative act that would have superseded or bypassed the Code of Criminal Procedure, by drawing

a distinction between extradition to a foreign country and transfer to an international tribunal—a view that has indeed prevailed in many circumstances involving the ad hoc tribunals.<sup>6</sup> The draft was prepared as a matter of priority, but it soon became clear that the Montenegrin representatives in the Parliament would block it. The possible solutions were to persuade the Montenegrins, or to wait for elections in Montenegro. Both options would have taken considerable time, and international pressure for transfer was mounting. International negotiators were, of course, not opposed to the rule of law, but it seems that they underestimated the momentum and complexity of the situation—and also, they were also driven by the ambition to put a negotiating success on their personal records.

In this situation, the draft legislative act prepared by Grubač was practically copied and submitted to the federal government in the form of a government decree. This ensured a dramatically streamlined process: There was no political group (or political power) within the federal government that could have blocked adoption of the decree, although it was, of course, questionable whether a government decree could supersede the legislatively enacted Code of Criminal Procedure. The Decree was, indeed, adopted by the government,<sup>7</sup> but was challenged before the Constitutional Court.<sup>8</sup> Before rendering a final decision, the Constitutional Court issued an interim measure prohibiting the application of the Decree with regard to the transfer of Milošević. In the meantime—as is pointed out in Shany's chapter—the pressure for transfer mounted, and it became clear that sorely needed international aid would depend on transferring Milošević.

The Đinđić government relied on a rather idiosyncratic provision of the 1990 Serbian Constitution, which stated that if acts of federal authorities jeopardize the interests of Serbia, Serbian authorities are entitled to take protective measures.<sup>9</sup> On this ground, the interim measure issued by the Constitutional Court was disregarded, and Milošević was transferred by the Serbian authorities. Reliance on the Serbian Constitution—known, ironically, as the “Milošević Constitution”—was questionable at best. Article 135 actually speaks of acts of federal authorities undertaken in disregard of the rights and duties of those authorities under the Federal Constitution—reserving to Serbian

authorities the right to decide if acts of federal authorities were in accordance with the Federal Constitution.<sup>10</sup> Even accepting the questionable logic of Article 135, it was really difficult to argue that under the circumstances, the Constitutional Court's provisional measure was issued in disregard of that Court's own rights and duties under the Federal Constitution.

The situation was a difficult one, and it is not easy to tell whether waiting would have been the better approach. It was certainly in line with justice—and also the international obligations of the FRY, of which Serbia was a part—that Milošević be delivered to The Hague. Still, the way this was achieved—relying on a dubious constitutional article, which itself represented an approach to law and politics that had undermined respect for the legal process<sup>\*</sup>—means that this was not clearly a triumph of the rule of law: If the transfer was supposed to achieve not only justice but renewed respect for the rule of law, its legacy for Serbia is ambiguous.<sup>†</sup>

## II. The VSO Minutes and the ICJ *Genocide* Cases

Concerning the nondelivery (or restricted delivery) of the minutes of the VSO to the ICJ, Shany's chapter offers a hypothesis about the character of these documents and the impact they could have had on genocide cases before the ICJ—*Croatia v. Serbia* and *Bosnia v. Serbia*.<sup>11</sup> His hypothesis is certainly plausible—it is indeed conceivable that these “state secrets” contained information that could have jeopardized the position of Serbia before the ICJ—but there are other plausible explanations as well.<sup>‡</sup>

Not many people had a clear understanding of the proceedings before the ICJ, and not many people knew exactly what would jeopardize the interests of Serbia in the case. What would have been really dangerous for Serbia were not just documents about Serbian crimes—even less crimes of Bosnian Serbs—but only documents that could have specifically linked Serbia with genocide. The holders of these documents had a much more general picture; they also wanted to avoid any possible personal liability, in Serbia, for failing to insist on measures of protection.

In a similar vein, commentators who speculate that these documents would have provided evidence of Serbia's role in the Bosnian war have



often left out of sight that this would not necessarily have made them relevant before the ICJ. Bosnia's complaint was raised under the Genocide Convention, and the jurisdiction of the ICJ extended only to genocide; hence, only documents evidencing complicity in genocide could have had relevance. Other documents could have brought serious embarrassment, but could not have changed the ICJ's decision. Without knowing the content of these documents, one cannot rule out that they contain some evidence that is relevant, even with regard to genocide; yet it is also a plausible assumption that although these documents contain evidence of misconduct and crimes, they cannot sustain or support the allegation that Milošević or Serbia was responsible for genocide.

Nor should commentators assume the documents are particularly incriminating simply because they were withheld. There are many reasons a state might withhold such materials. Quite a few countries have denied submission of documents to the ICTY, or have placed restrictive conditions on the use of documents submitted, relying on considerations of national security.<sup>12</sup> In Serbia's case the holders of the documents (just as holders of some documents in other countries) may have intended to save their country from adverse publicity. (We might wonder if this was a sensible strategy: The questions raised and the guesses made about the content of the documents may have produced even worse publicity.) Compared with other countries, Serbia had an added argument to refuse (or rather to insist that parts of the documents remain secret), and this was to protect its interests in the ICJ cases. This is one plausible way of interpreting Sivilanović's comment to Del Ponte about the relationship between the genocide charges against Milošević and the ICJ case.\*

These various interpretations are all plausible, and most external observers are not well-positioned to decide among them. That they nonetheless do speculate—and in many cases assume that the missing documents constitute an elusive proof—demonstrates both the momentous nature of the question at issue in these two cases, and the degree to which the termination of the *Milošević* trial left behind it an ambiguous and unresolved legacy.



### III. On the “Uneasy Dichotomy between Individual and State Responsibility”

One of the main issues dealt with in Shany’s chapter is the (uneasy) relationship between individual and collective responsibility. It is quite easy to conclude that individual responsibility provides a clear and irreducible path to justice; we may criticize the precise mechanism and the actual functioning of the ICTY, but it would be difficult to criticize the main underlying idea. Collective responsibility, on the other hand, is necessarily a construction, and not always a sensible one. In the specific circumstances of the Yugoslav conflicts, pursuing disputes against states was neither logical nor purposeful. Shany’s chapter relies on the agent–principal relationship. This is certainly a reasonable approach in general, but does it reflect reality? Did Milošević have a principal? There was a time during the conflict in Croatia when the president of the Yugoslav Presidency was Stipe Mesić. Was Mesić—or the SFRY headed by Mesić—a principal of Milošević?

It is unquestionable that compensation of victims (or their relatives) is more realistic in the context of state responsibility. But this logic is more persuasive, and the situation more clear, when the claimants are individuals. When the claimant is not an individual but a state, that state will get the compensation, and it is difficult to predict how the compensation will be distributed.

A critical problem in the setting of the Yugoslav cases—and of *Bosnian Genocide* in particular—lies in the fact that the parties facing each other before the ICJ are simply not identical with the parties that faced each other in the actual conflict. Endeavoring to find a response to the devastation it suffered during the war, Bosnia tried various fora. It was quite difficult to articulate actual grievances in the context of disputes among states, yet given its limited options, Bosnia nonetheless pursued this route. For example, in November 1993, Bosnia sent to the UN General Assembly and the Security Council a “Statement of Intention,” in which it declared its “solemn intention” to institute legal proceedings against the UK for violating the Genocide Convention, claiming that the UK’s insistence on maintaining the arms embargo had aided and abetted genocide.<sup>13</sup> This path was eventually abandoned, but it suggests the

difficulty even in more facially plausible cases such as that brought against Serbia.

Furthermore, the Yugoslav conflicts brought about the dissolution of Yugoslavia, and part of the conflicts—particularly those in Croatia—took place prior to the dissolution. If one treats states as the perpetrators and victims, consequential problems arise: There were, indeed, many Croats who suffered in 1991, but there was as yet no Croatia as a subject of international law—and no FRY yet either. A construction that juxtaposes states emerging from the former Yugoslavia—and insists on state liability—is actually focusing on states that did not exist at the time when some of the crimes took place. (There were some attempts to rely on the *in statu nascendi* concept,<sup>14</sup> but this made the construction even more artificial.) Another problem with regard to state liability before the ICJ arises from the limitations on the court's jurisdiction. Because in the Yugoslav cases the jurisdiction of the ICJ is limited to genocide, the proceedings—with their focus on state responsibility—simply cannot yield a comprehensive picture of the conflict's reality.

And, perhaps most important, the actual conflict underlying the *Bosnian Genocide* case was an ethnic conflict. Had two true nation-states been fighting, they might plausibly have personified and represented the actual combatants before the ICJ, but this was not the case. The dispute that was brought before the ICJ was between two multiethnic states, Bosnia and the FRY, later Serbia. This construction was simply at odds with reality—and hardly conducive to justice. Following the ICTY, the ICJ established that the VRS committed genocide at Srebrenica.<sup>15</sup> As a factual matter this is unobjectionable, but it is not clear how this can be meaningfully understood within the actual legal dispute, considering that the VRS is affiliated with the Applicant—that is, the victim!—as the RS is a unit within Bosnia.

The idea that state-centered legal processes can adequately represent conflicts fought along ethnic lines asks too much of the law, and conceals too much about those conflicts. Certainly, in the ICJ cases spawned by the Yugoslav conflict, the construction that juxtaposed newly emerged, multiethnic states as parties to the dispute was not sustainable. The actual countries that underwent these wrenching conflicts were, and are, complex; treating them as unitary legal subjects simply masks their internal ambiguities and the choices those imply for law and politics.

## Abdicated Legacy

The Prosecution's Use of Evidence from *Milošević*

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*What remains from the Milošević mega-trial? Did justice die with the man, as many victims are quick to say? This chapter examines the impact of the evidentiary aspect of the Milošević trial on other cases at the ICTY. It reviews crucial evidence introduced in Milošević that was later disregarded in other related cases. Developments in those trials show the Prosecution's ambivalence toward the Milošević case's evidentiary legacy. Although the case related to Kosovo and Croatia was confirmed through subsequent judgments, the Bosnia case's legacy remains in limbo. In particular, the proceedings against Stanišić, Simatović and Perišić demonstrate the changes and flaws in the Prosecution's post-Milošević strategy. Though Milošević's death deprived the public and the victims of judgment, it was not him but other factors that killed the trial's contribution to the truth.*

### **I. Introduction: After *Milošević*—The Persistent Question of Belgrade's Role**

The *Milošević* trial was the first to comprehensively examine Belgrade's role in the Yugoslav wars. Although it was widely assumed that Serbia had supported the Serb combatants in Croatia and Bosnia, the full extent of that support and the mechanisms by which it was provided had not been publicly disclosed until the trial. This was not accidental: In order to convince the world that it was not taking part in the wars, Belgrade had kept much of the detail about its involvement in Bosnia and Croatia hidden.

As several other authors observe, Milošević accused the ICTY of collectively and vicariously placing the Serbian nation on trial, but the Prosecution's real collective claim was more focused. The Prosecution's strategy advanced an overall thesis to explain Belgrade's involvement: a joint criminal enterprise connecting the principal actors in Serbia, the RS, and the RSK in a plan to use violence and terror to forcibly and permanently remove non-Serbs from Kosovo and from large areas in Croatia and Bosnia that were to become part of a new Serb-dominated state. At the center of this JCE, uniting its three parts, was Milošević, charged on the basis of his *de jure* positions, variously held over the decade of the wars, as president of the FRY and of Serbia, Supreme Commander of the VJ, member and president of the Supreme Defense Counsel; and his *de facto* authority over and support to the institutions of the FRY, Serbia, the RS, and the RSK, and key individuals within them.\*

The indictment thus promised to explain how Belgrade—Milošević, but also his close associates in the federal and Serbian administrations, military, and police—was implicated in an arc of criminality from Croatia to Kosovo. And in the trial, the Prosecution fulfilled this promise. The evidence introduced showed how the Serbian leadership provided financing, weapons, and material support to Croatian and Bosnian Serbs; helped create the Croatian Serb and Bosnian Serb armies and set up administrative and personnel structures to support these armies, which relied almost entirely on Serbia; provided these armies with key personnel and kept its own agents in their command structures; and sent its own units over the border to fight.†

But Serbia's role in the war was not constrained to logistical and financial support or occasional military intervention; indeed the key question, for many, was not whether Milošević enabled others to wage war and commit genocide, but whether he was himself the architect. The



circumstantial, logical case was compelling: Given the intense involvement of Serbia's highest authorities in every aspect of the wars, the question necessarily arises if they shared or even determined the common objectives, and the crimes, which the beneficiaries of their support were so involved in planning and carrying out. Did they have a common goal?

The *Milošević* trial addressed this subject with varying degrees of confidence. The linkage between Milošević and crimes in Kosovo was more direct due to his clear de jure and de facto authority over forces acting in territory under the FRY's jurisdiction. For Croatia and Bosnia, the Prosecution introduced evidence indicating that Milošević not only aided and abetted crimes against humanity in specific municipalities, including the genocide in Srebrenica, but may well have participated in the planning and preparation of some of these crimes, or directed his subordinates to perpetrate them, in furtherance of the JCE's common criminal plan.<sup>1</sup>

However in absence of a final verdict, Milošević's precise role and the forms of his criminal liability were never determined. What kind of orders or directions did he give when meeting with his closest associates or with the Bosnian and the Croatian Serb leadership? Did he merely acquiesce in or provide support to their plans? Did he give general directions or even precise instructions for the perpetration of specific crimes? As Waters shows, the trial did not provide a clear or definitive answer to these questions, which are of both legal and historical importance.

But the ICTY's indeterminate silence in the *Milošević* trial does not mean that these questions cannot be answered, because although Milošević was tried alone, the theory on which he stood trial was not unique to him. If there was a JCE, as the Prosecution alleged, then by definition it included others as associates or co-perpetrators. In the course of his trial, the Prosecution explained how Milošević worked in concert with or through these individuals, who shared his intent to achieve their JCE. And, in fact, most of his alleged main associates or co-perpetrators have been indicted by the ICTY. Thus there was an opportunity to consider the complicity and responsibility of Milošević, even after his trial: If, following their own trials, these co-perpetrators are found guilty as members of the same joint JCE, then—indirectly, informally—we may know that Milošević was too.

This then was the opportunity and the challenge that confronted the Prosecution after the death of Milošević: Without a judgment, the strong evidence led against Milošević could only be vindicated in the trials of other members of the JCE. So, how did the Prosecution respond?

## **II. Legacy and Deviation: The Prosecution's Varying Theories in Post-*Milošević* Cases**

Since the death of Milošević, several new trials touching the heart of his regime have begun at the ICTY. They involve principal members of Serbia's or the FRY's state apparatus involved in the same JCE alleged against Milošević,\* and mostly build on evidence that was also introduced in the *Milošević* trial. In these cases, the Prosecution has followed two different paths. In the case against senior Serbian officials active in Kosovo, the Prosecution used the full evidentiary legacy of the *Milošević* case and obtained guilty verdicts for most of the individuals originally charged alongside Milošević.<sup>2</sup>

Similarly, the judgments rendered against members of the Croatian Serb leadership confirmed that there was indeed a common plan and direct links between the RSK leadership and the Belgrade authorities; they corroborate most of the *Milošević* Prosecution's *Croatia* case and clearly suggest that Milošević was the JCE's indisputable leader. These final judgments indirectly indicated Milošević's criminal liability, suggesting the verdict that could have been issued had Milošević not died.<sup>3</sup> Strengthened by these findings, in all subsequent cases involving crimes in Croatia committed by Milošević's associates from the Serbian state apparatus, the Prosecution has stuck with the strategy and the evidence it had used in the *Milošević* case.

But in all Bosnia cases against Serbian or FRY officials, the Prosecution has departed from its original approach, instead dropping evidence or downplaying the role of key participants—including Milošević's closest associates from Serbia. Some of these cases are still underway or on appeal, so it is too early to assess fully the impact of the ambiguous post-*Milošević* Prosecution strategy on the judges' conclusions. However, the acquittal on appeal in February 2013 of

Momčilo Perišić – the only Serbian or FRY senior official convicted and sentenced so far for crimes in Bosnia – already resonated as Milošević’s posthumous acquittal for Sarajevo and Srebrenica. The subsequent acquittal at the trial stage of Stanišić and Simatović has only reconfirmed this new narrative. The Prosecution may initially have brought Milošević to trial for being the main architect of ethnic cleansing in Bosnia, but it is unlikely that any remaining judgments will confirm this view, since the Prosecution no longer claims that Milošević’s closest associates were part of such an enterprise. And in any case, one result is clear: In different courtrooms the Prosecution is now presenting two different versions of the same events.

### **A. Legacy’s Logic: The *MOS* and Croatian Serb Cases**

The so-called *MOS* trial, against six senior Serbian officials,<sup>\*</sup> held special significance as the closest that an international criminal tribunal was likely to come to judging the actions of Milošević and Serbia in Kosovo. In the *MOS* trial, the Prosecution successfully demonstrated the very claim it had alleged during *Milošević*: that between January and June 1999, forces of the FRY and Serbia, acting at the direction of or with the support of Milošević, executed a campaign of terror by deporting or forcibly transferring a large part of the Kosovar Albanian population, and that they did this in order to change the ethnic balance in the province and ensure continued control by Serbian authorities over Kosovo. The February 2009 judgment, which returned convictions against five of the six, dismissed the argument used by Milošević during his trial: that civilians in Kosovo were fleeing the NATO bombing instead of the atrocities he stood accused of ordering. Instead, the Chamber found that none of the witnesses cited NATO bombing as a reason for their flight.<sup>4</sup>

A critical component of the *MOS* trial and judgment was the claim that the individuals on trial derived their power to commit crimes from their relationships to Milošević. The judges accepted the Prosecution’s argument that Milošević removed those who thought independently and replaced them with people who obeyed him blindly in order to implement the JCE in Kosovo. The *MOS* Trial Chamber issued longer prison sentences for those found to be the closest associates of Milošević, who is described in the judgment as the main architect of the JCE in Kosovo.



Thus FRY Deputy Prime Minister Nikola Šainović, found to be “one of the closest and most trusted Milošević associates[,]” was sentenced to 22 years in prison.<sup>5</sup> The Chamber noted that his “leading role” as a political coordinator of civilian and military activities in the province stemmed from his close relationship with Milošević.<sup>6</sup>

The different sentences awarded to the military officers show the centrality of Milošević. Nebojša Pavković, the former Commander of the Third Army of the VJ, was also given a 22-year sentence, while his nominal superior—Dragoljub Ojdanić, the former Chief of the General Staff—was given 15 years. The judges accepted evidence given during the trial by the former deputy chief of the military *Kontraobaveštajna služba* (Counterintelligence Service or KOS) Aleksandar Vaslijević, who said that Pavković often skipped over the chain of command and went directly to Milošević without Ojdanić’s knowledge and permission.<sup>7</sup>

Even its one acquittal—of Milan Milutinović, President of Serbia during the Kosovo war—reinforced the centrality of Milošević to the *MOS* judgment. The Chamber found that it was in fact “Milošević, sometimes termed the Supreme Commander, who exercised actual command authority” over Serbian troops and security police officers in 1999 rather than Milutinović.<sup>8</sup> Only those who were closely trusted aides of Milošević or whom he allowed to wield effective power were convicted.

A similar strategy and outcome resulted in the Croatian Serb cases. In all cases involving Milošević’s associates in the JCE in Croatia, the Prosecution provided evidence—as it had in the *Milošević* trial—about the campaign of persecutions launched in 1991 against Croats and other non-Serbs and designed to forcibly remove them from the roughly one-third of Croatia that was to become part of a new Serb-dominated state. So far, the ICTY has issued judgments against several members of the Croatian Serb leadership, which confirm that there was indeed a common plan and direct links between senior figures in the RSK and the Belgrade authorities, under Milošević’s leadership. As with the *MOS* case, the judgments’ reading of the Prosecution’s evidence corroborate most of the *Milošević* Prosecution’s *Croatia* case, and clearly suggest that Milošević was not only the JCE’s prominent figure but its indisputable leader.

The first to be convicted was Milan Babić, the first RSK president from 1991 to 1992, who pled guilty to crimes against humanity as a co-



perpetrator of the JCE and was sentenced to 13 years.<sup>9</sup> Babić was a key prosecution witness in the *Croatia* phase, helping establish the link between Milošević and the crimes committed in Croatia. Babić testified that “the [parallel] structure of power and force in the SAO [*Srpska automna oblast*, Serbian Autonomous Oblast] Krajina” that eventually replaced him in 1992 was controlled by Milošević through Serbia’s MUP and the SDB leadership assigned to establish it. He claimed that Milošević wanted to conceal his true role and the ties between Serbia and Krajina in order for the JCE goals to succeed while making sure Serbia was not blamed for the war, the breakup of Yugoslavia, and the creation of a Greater Serbia. Babić’s testimony in *Milošević* in 2002—so damaging for Milošević at the time—was consistent with the basis of Babić’s own guilty plea.

The *Martić* judgment also confirmed part of the *Milošević* Prosecution case and notably the link between Belgrade and the RSK leadership. Milan Martić, who held various senior positions in the SAO Krajina and RSK between 1991 and 1995, and was sentenced in 2007 to 35 years for crimes against humanity,<sup>10</sup> was also named as a co-perpetrator in the JCE led by Milošević. The judges noted that Martić had “close and direct” contacts with the other participants in the JCE, including Milošević, Karadžić, Mladić, Šešelj, Stanišić and Simatović, and Dragan Vasiljković (Captain Dragan) that resulted in substantial financial, logistic, and military support by the JNA and VJ as well as the Serbian MUP and SDB.<sup>11</sup> Noting that support came from Serbia throughout the period of the war, the judgment quoted a witness who had described the SVK and the VJ as “as one and the same organization, only located at two separate locations.”<sup>12</sup>

Thus, in the cases completed so far that address Croatia and Kosovo, the Prosecution continued with theories and evidentiary strategies consistent with the argument it had advanced in the *Croatia* and *Kosovo* phases of *Milošević*. The Prosecution pursued the logic of its own principal case; the result has been, not only convictions of the *other* members of the JCE, but an indirect vindication of *Milošević*—an indirect characterization of Milošević’s role and responsibility.

But these are neither the only cases, nor the only conflicts Milošević and his JCE reached. In its trials on Bosnia, the Prosecution has abandoned the logic and the legacy of *Milošević*.

## **B. Deviations: The Bosnia cases**

Jovica Stanišić, Franko Simatović, and the recently acquitted Momčilo Perišić are the only Belgrade regime officials other than Milošević indicted by the ICTY for crimes committed in both Croatia and Bosnia. In addition, Milošević's hard-line nationalist ally in Serbia, Vojislav Šešelj, who coparticipated in the JCE as the leader of the SRS, is also in the dock for plotting to murder, torture, and illegally imprison non-Serbs in Croatia, Bosnia, and Vojvodina. In the *Croatia* part of these cases, the Prosecution has stuck to its earlier strategy according to which it attempted to establish Milošević's criminal liability through Stanišić, Simatović, Šešelj, and other JCE core members. But in the *Bosnia* part, the Prosecution has radically departed from its approach in *Milošević*, depriving the public and the victims of a new opportunity to determine, at least indirectly, Milošević's responsibility in the longest and bloodiest part of his overall criminal plan.

### **1. *Prosecutor v. Stanišić & Simatović***

At the first sight, the Prosecution case against Jovica Stanišić and Franko Simatović overlapped with the *Milošević* case and its JCE theory. Senior trial attorney Dermot Groome, who was in charge of the *Bosnia* phase, identified the two former Serbian security chiefs as key participants in the “struggle for the achievement of the common goal of all Serb lands[,]” using Stanišić's own words in a telegram from 1994.<sup>13</sup>

The indictment charged Stanišić, Chief of Serbia's SDB, and his deputy Simatović, head of the SDB's special operations units, with responsibility for organizing, training, financing, and controlling the members of special SDB units that terrorized, expelled, and killed thousands of non-Serbs between May 1991 and December 1995.<sup>14</sup> Their trial began in April 2008, two years after *Milošević* ended. According to the Prosecution's case,<sup>\*</sup> Stanišić—once considered the second most powerful official in Serbia—established a group of elite forces designed for secret operations outside Serbia, the JSO or *Crvene Beretke*; these forces acted under Simatović's operational command. Stanišić and Simatović supposedly acted on direct orders from Milošević, who trusted his secret police and their covert fighting force more than the formal military; in fact, the covert units were designed to shield the Serbian

government and military from liability for some of the most brutal campaigns against civilians outside Serbia.

Stanišić and Simatović's bloody crimes in Croatia and Bosnia had already been partially mapped in *Milošević*—quite literally, as could be seen in a video of SDB covert special forces' sixth anniversary ceremony at their headquarters in Kula, Serbia in May 1997, which they celebrated in Milošević's presence. Shown in the *Milošević* trial, the Kula video was one of the most compelling documents to have surfaced during the case: Standing in front of a marked map of the former Yugoslavia with all the places where the *Crvene Beretke* had fought in Croatia and Bosnia, Jovica Stanišić addressed Milošević, saying “all we have done was done on your orders.”<sup>15</sup> The prosecutors in *Stanišić & Simatović* promised to establish that a number of other violent paramilitary groups—Arkan's *Tigrovi* (Tigers), the *Škorpioni*, Frenki's men, Captain Dragan's Kninjas, Martić's men, Šešelj's men—were not rogue bands of criminals or volunteers, but well-trained, well-equipped, and well-paid fighters connected with or even part of Serbia's secret police. Milošević's links to the leaders of these, among the most violent groups in the Bosnian war, were personal and unmediated.

*Stanišić & Simatović* was also a case in which almost all the participants of the JCE converged: the Serbian, Croatian Serb, and Bosnian Serb leaderships and the militia commanders. As the prosecutors said during his trial, Milošević planned, instigated, and committed the crimes through Stanišić, Simatović, and other participants in the JCE. *Stanišić & Simatović* was in many ways the continuation of the *Milošević* trial, with the potential to confirm Milošević's role as chief architect of the bloodshed both in Bosnia and Croatia and to bring to light the parallel system he created to wage wars and carve a homogeneous Serb state out of Yugoslavia.

Yet although *Stanišić & Simatović* shared so much, logically and evidentiarily, with *Milošević*, the Prosecution dramatically departed from the legacy of the *Milošević* Bosnia case. There the Prosecution attempted to establish Milošević's criminal liability for genocide through Stanišić and Simatović, due to their knowledge about and authority over the SDB units actually engaged in genocidal acts. But later, in their own trial, the Prosecution minimized Stanišić's and Simatović's states of knowledge and their key role in the overall JCE, including in the Srebrenica genocide.



Although additional evidence supporting its earlier theory has emerged since the end of *Milošević*, the Prosecution adopted a new strategy that so seriously contradicts its *Milošević* case that had the Prosecution followed its current strategy then, it would have had to drop the genocide charges against Milošević.

The two trials characterized Stanišić and Simatović's involvement in the events at Srebrenica—the only juridically confirmed act of genocide in the Yugoslav wars—in radically different terms, and in the process foregoing an explanation of Milošević's involvement. In summer 1995, SDB units deployed in eastern Bosnia to assist the final offensive against the enclaves near Serbia's borders, aimed at eradicating the last remaining Muslim populations. One of these units, the *Škorpioni*, executed at Trnovo at least six Muslim men and boys captured in Srebrenica—actions later made notorious in another much publicized video played in the *Milošević* trial. These SDB deployments were designed to aid the VRS attack on the enclaves of Srebrenica and Žepa by keeping pressure on the ARBiH near Sarajevo;<sup>16</sup> their participation was therefore related to the implementation of the JCE. This was, in fact, how these acts were characterized in *Milošević* and in the *Stanišić & Simatović* indictment as amended in December 2005 to include this new evidence.

Yet despite the compelling new videotaped evidence, the Prosecution did not amend the indictment to include genocide. Instead, Stanišić and Simatović were charged with murders (as crimes against humanity) in relation to the killings at Trnovo. Then in May 2006, two months after the *Milošević* trial ended, the Prosecution revised the *Stanišić & Simatović* indictment once more, dropping 10 paragraphs that had described in detail the participation of SDB forces in the capture of Srebrenica and the subsequent killings of over seven thousand male prisoners.<sup>17</sup> In a single stroke, the *Škorpioni* killings became a separate incident from the Srebrenica genocide, committed with no specific genocidal intent—the very same killings that the Prosecution had argued in the *Milošević* case were part of the genocide at Srebrenica.<sup>18</sup>

Ironically, it was principally through Stanišić and Simatović that the Prosecution had attempted to demonstrate Milošević's liability for genocide in Srebrenica and elsewhere in Bosnia, insisting that from 1991 to 1995 the two had provided channels of communication between and



among the core members of the JCE in Belgrade, and had controlled and directed Serbia's covert special forces in some of the most brutal campaigns against non-Serb civilians. The Prosecution also claimed during the *Milošević* trial that the SDB forces were conceived to be a driving force for genocide against non-Serbs.<sup>19</sup> Prosecution evidence and witnesses in *Milošević* described Stanišić as Milošević's executioner and protector: It was through Stanišić that Milošević exerted control over Mladić and Karadžić, and also controlled the Serbian SDB.<sup>20</sup> Yet later, in his trial, Stanišić's relationship to the events at Srebrenica evidently did not warrant charges, raising the logical question of how he could have provided the link sustaining the earlier attribution to Milošević.

Indeed, the charges compared across the two trials have never made sense. *Stanišić & Simatović* never included a charge of genocide, even though the indictment was issued and amended during the *Milošević* trial, whose theory of genocide relied on Milošević's control over the VRS through its command structures filled by VJ officers and on Stanišić and Simatović's active knowledge and participation in ordering the killings. Members of a JCE possessing the shared intent of forcibly transferring people from Srebrenica and killing them as a means to realize their common goal (or even sharing the intent of committing genocide) could each be held responsible for all reasonably foreseeable crimes committed as a consequence of their shared plan. If Milošević was able to foresee the risk of genocide, as the charges against him implied, logically so did Stanišić and Simatović, who were informing him of everything that occurred in the field. Indeed, the theory that Milošević foresaw a risk of genocide arising out of the actions of other JCE members presupposes at least *some* other members' intentional perpetration of genocide.\*

So far, the Prosecution has neither explained why it advanced one theory in *Milošević* and another in *Stanišić & Simatović* nor why it appears to have reshaped the facts surrounding Srebrenica to avoid expanding the charges to genocide after additional and compelling evidence had emerged. The Prosecution was not facing any request from the Trial Chamber to reduce the indictment or shorten the trial; the Chamber had even denied a Defense motion to dismiss the charges against Stanišić on medical grounds.<sup>21</sup>

It is possible that, in originally declining to pursue genocide charges, the Prosecution was simply responding to a forensic concern that it might not have enough evidence to demonstrate that Stanišić and Simatović had displayed genocidal intent. But as the genocide charge against Milošević relied on the mediation of his subordinates, it is hard to see why such a concern would not also have precluded the earlier genocide charge against him. Nor was the Prosecution's original theory in *Milošević* obviously defective: At the midpoint of that trial, in the Rule 98 *bis* Decision that Waters and Nielsen discuss, the Chamber said there was potentially sufficient evidence to consider a genocide conviction against Milošević in Srebrenica and other municipalities. The 2004 Decision ordered the trial to continue, as the Prosecution had presented a sufficient case on which a reasonable trier of fact could be satisfied that genocide had occurred in Srebrenica and other municipalities.<sup>\*</sup> Moreover, the Chamber accepted the plausibility of the claim that these were not separate criminal plans but were part of the same JCE<sup>22</sup>—one which the Prosecution asserted included Stanišić and Simatović. And once the *Škorpioni* Trnovo videotape was uncovered in 2005, the Prosecution insisted it was compelling evidence of Milošević's liability in the genocide, which makes the case for genocide charges against Stanišić and Simatović seem compelling.

Still, the Prosecution has in fact been ambivalent about the question of Belgrade officials' liability in the genocide since the beginning. The *Milošević* Prosecution team had been divided on this very issue and considered seriously on several occasions dropping the charge of genocide together with the Srebrenica section, but their proposal was eventually rejected by Chief Prosecutor Del Ponte.<sup>23</sup> However, when Stanišić and Simatović were originally indicted in 2003, the Prosecution chose not to charge them for genocide, on the grounds that there was not sufficient evidence to prove the direct participation of the *Crvene Beretke* or other covert Serbian MUP forces in the Srebrenica killings. But after the 2004 *Milošević* Chamber's Rule 98 *bis* Decision and the Trnovo videotape that emerged the next year, the Prosecution's concerns about its own genocide theory should have been put to rest. It remains therefore hard to understand why the Prosecution ignored Stanišić's and Simatović's links with the Srebrenica genocide when it amended the indictment in 2005 and again later on, and thus deviated from its *Milošević* strategy even while additional evidence showed it was actually through Stanišić and Simatović

that Milošević's participation in the shared plan to commit genocide could most easily be established.

Ultimately, the reasons behind the Prosecution's "no-genocide" strategy in *Stanišić & Simatović* are unclear, but the consequences have been profound and comprehensive. All other deviations from the Prosecution's strategy in *Milošević* have been the result of this choice, including the fact that the Prosecution now claims that there were not one but several separate JCEs, each with its own specific members. In its 2008 opening statement for *Stanišić & Simatović*, the Prosecution went even further by explaining that in respect to the Trnovo killings, the *Škorpioni* "were made available to Karadžić, Mladić and other core members of the joint criminal enterprise to perpetrate crimes in furtherance of their common criminal plan."<sup>24</sup> The Prosecution thus now suggests that although Milošević, Stanišić, and Simatović may have contributed to this specific plan by providing personnel, they did not share its intent or were aware of it, and indeed they were no longer named as members of the plan. This also means that the Prosecution no longer claims, as it did in *Milošević* and in the December 2005 indictment, that Stanišić and Simatović had effective control over the immediate perpetrators of the Trnovo killings, because at the time of the crimes the *Škorpioni* were at the disposal of the Bosnian Serb leadership advancing its own, separate criminal purpose in which Stanišić and Simatović were not participants and of which they were not aware. Had they followed their own logic from *Milošević*, prosecutors could have charged Stanišić and Simatović with genocide for these same acts; instead, they were left with charges of failing to prevent or punish murder under a theory of superior responsibility, as they inexplicably conceded that the Accused had neither any knowledge of the genocidal plan nor de facto authority over the *Škorpioni* at the time.

This approach suggests that the Prosecution is now treating the Srebrenica genocide as a parallel criminal plan developed separately from the overarching *Milošević* JCE and with a separate and specific intent—in this case, a genocidal one—not shared by Stanišić and Simatović. The Prosecution has thus attempted to prove both that Stanišić and Simatović exercised influence and control over the Bosnian Serb leadership and events in Bosnia—as part of *Milošević*—but later, as part of their own trial, that they did not, especially at the time of the Srebrenica genocide,



and thus could not have even reasonably foreseen that the crimes to which they had contributed would escalate to genocide.

The *Stanišić & Simatović* trial was expected to help establish facts from the unfinished *Milošević* trial. It may have done so to some extent (and may still do on appeal), but it will not help resolve the most controversial issue that still divides experts and historians, and may even complicate it. Did Milošević and his key associates aid and abet, or were they complicit to genocide in Srebrenica? Did they even share a genocidal intent? The *Stanišić & Simatović* trial did not address these questions or test the available evidence. The strategy adopted by the Prosecution in their trial contradicts its earlier strategy, and thus withdraws from the enterprise of answering the questions posed during *Milošević*, and which, indeed, made that trial so important for the victims of Milošević's wars.

## **2. Prosecutor v. Perišić**

The indictment against Momčilo Perišić, Chief of the Main Staff of the VJ from 1993 to 1998, also revealed serious inconsistencies and departures from *Milošević*. In particular, the *Perišić* trial reprised the ambivalence the Prosecution felt concerning Belgrade's control over the VRS and that had earlier poisoned the *Milošević* trial. Although Perišić had far less power and authority than Milošević, his case revived debate within the Prosecution.\*

As with Stanišić and Simatović, Momčilo Perišić was not indicted for genocide or for complicity. He was on trial for aiding and abetting crimes against humanity by providing, as Chief of the VJ Main Staff, substantial logistical and material support and personnel to the VRS for the shelling of Sarajevo and the genocide at Srebrenica, and for failing to take necessary and reasonable measures to prevent or punish VJ officers who were involved in these crimes.<sup>25</sup>

The case relied for the most part on evidence from *Milošević*, including the VSO transcripts. In his capacity as president of Serbia, Milošević was a member of the VSO, along with the president of the FRY and the president of Montenegro. It was at the VSO that state policy was formulated and important and critical political and military issues were debated. Perišić attended each meeting and acted within the policies and limits set by the VSO, in which Milošević played a predominant role.



As in the *Milošević* case, the decisions and minutes from the meetings of the VSO were used to establish Perišić's role in the effort to establish a single state for all Serbs. At the opening of the trial,<sup>26</sup> the *Perišić* Prosecution promised to “pierce the veil of Milošević's elaborate deceptions”<sup>27</sup> designed to convince the international community and the world that Serbia was not taking part in the war in Croatia and Bosnia. On the basis of evidence already used in *Milošević*, the Prosecution set out to show that Belgrade had control over the SVK and VRS forces through the successive VJ Chiefs of General Staff, including Perišić after 1993, and the VSO members, in particular Milošević.

The Prosecution theory and evidence showed that Perišić—and above him Milošević, through his dominant role in the VSO—had de jure superior authority over VJ officers, including those serving in the VRS and the SVK. In both of these armies, the commanders in chief, their main staff, the corps commanders, and corps command staff were VJ officers assigned through the 30th and 40th Personnel Centers of the VJ General Staff, which paid them and processed their administration. The VSO and Perišić were able to influence the behavior of their subordinates serving outside Serbia and, additionally, to ensure that VSO decisions were implemented in Bosnia. The Prosecution did not claim that the VSO or Perišić gave direct orders to VJ officers serving outside Serbia, only that they either acquiesced in or knowingly supported VRS and SVK criminal activities.<sup>28</sup>

Perišić's liability for the crimes committed in Sarajevo was demonstrated in a way similar to what was done in the *Milošević* trial. But for Srebrenica, prosecutors chose a very different and inconsistent approach: Perišić was accused of bearing command responsibility for failing to prevent and investigate the “killings in Srebrenica,” which are said to have been planned, ordered, and committed or aided by VJ officers serving in the VRS.<sup>29</sup> Although as early as 2004 the ICTY had definitively held that genocide occurred in Srebrenica and established that the VRS Main Staff had genocidal intent<sup>30</sup>—and has found several VJ officers serving in the VRS guilty of genocide or complicity of genocide\*—the Prosecution in *Perišić* chose to qualify these killings as crimes against humanity committed “with the intent to discriminate against the Bosnian

Muslim population of Srebrenica on political, racial or religious grounds[.]”<sup>31</sup>—not to refer to Srebrenica as genocide.

This was a strategic choice: Because it had called Srebrenica a crime against humanity, the Prosecution did not have to establish whether Perišić knew about his subordinates’ specific genocidal intent to destroy the able-bodied Bosnian Muslim men of Srebrenica as a group; instead, the Prosecution needed only to demonstrate Perišić’s awareness of the perpetrators’ more limited “discriminatory intent” to kill or expel the local Bosnian Muslims. But this was a choice that conceded too much: The Prosecution could have easily relied on prior ICTY jurisprudence to assert that genocide occurred at Srebrenica and still conceded that Perišić himself did not know about the perpetrators’ genocidal intent. It was therefore unnecessary to undermine the prior jurisprudence on the nature of the crimes committed after the fall of Srebrenica by describing these same “killings” as crimes against humanity rather than genocide.

This is the logic of the *Krstić* Judgment. On appeal, General Krstić, a VJ officer serving within the VRS as commander of the Drina Corps and whose subordinates participated in the genocide, was acquitted of genocide because he did not possess the specific intent required, but he was convicted for complicity.<sup>32</sup> The Appeals Chamber explained that Krstić could not be convicted as a direct perpetrator because he was not part of the agreement among other officers to commit genocide; his knowledge of the executions and of the use of personnel and resources under his command was insufficient to support “the further inference of genocidal intent on his part.”<sup>33</sup> Yet although Krstić was not a supporter of the genocidal plan, the judges found that he permitted the VRS Main Staff to employ Drina Corps resources even though he knew their genocidal intent, and found this sufficient to convict for complicity.

On the available evidence, a similar logic could have applied to Perišić: He had command authority over VJ officers in the VRS, some of whom were promoted at Perišić’s request after the genocide occurred;<sup>\*</sup> he exerted command authority over those within the VRS Main staff who had the specific genocidal intent; he had a close relationship and direct channels of communication with General Mladić during and after the attack;<sup>†</sup> and he had knowledge of the genocide at least after the event and yet failed to take the necessary and reasonable measures to punish the

crime. One protected witness even gave evidence that among the members of the forces who arrived in Srebrenica and Potočari at the beginning of the killings were members of the VJ Užice Corps—soldiers directly in the formal chain of command under Perišić.<sup>34</sup>

At trial in 2011, Perišić was found guilty on eight counts as an aider and abettor, and on four counts as a superior for failing to punish subordinates, for which he was sentenced to 27 years in prison.<sup>35</sup> Perišić was initially acquitted only of extermination as a crime against humanity,<sup>36</sup> on which the Tribunal was unwilling to convict because “the evidence presented [did] not lead to the only reasonable conclusion” that Perišić had effective control over the 30th PC or that Perišić had the requisite knowledge that the VRS intended to commit a crime on the scale of Srebrenica.<sup>37</sup> This could suggest that had the Prosecution maintained the genocide charge as they had for Milošević, the charge would have been unsuccessful.

The Trial Chamber did establish that, in his capacity of Chief of the VJ General Staff, Perišić was indeed de jure the superior of the VJ officers serving through the 40th Personnel Center in the SVK and through the 30th PC in the VRS, including Mladić, the VRS main staff, and the commanders of the VRS Drina Corps and its brigades who committed or were involved in the genocide at Srebrenica.\* The Chamber also established that the VJ, SVK, and VRS operated in an atmosphere of unity and acted toward a common goal.<sup>38</sup> But although Perišić was found to have exercised effective control over the VJ officers serving in the SVK,<sup>39</sup> the Chamber said that the same did not apply in regards to the VJ officer serving with the VRS, even though Perišić had a collaborative relationship with Mladić and substantially aided his operations.<sup>40</sup> As a consequence, Perišić could not bear command responsibility for the crimes committed by his subordinates in Srebrenica. Although Perišić may not have had effective control or knowledge of the extermination, he was found to have had knowledge both of various crimes committed prior to the massacre and of the discriminatory intent of the VRS, shown though evidence of the actions of the international community, local media, and meetings between Milošević and Perišić.<sup>41</sup> From the evidence presented, it might have been possible that others, including Milošević, had both knowledge and effective control and could have been successfully prosecuted. However,



in light of Perišić's acquittal by the Appeals Chamber on all counts including Sarajevo and Srebrenica, the Prosecution's caution may appear vindicated, as it probably would not have been able to convince the judges of the validity of the genocide charges since the Appeals Chamber was not convinced of Perišić's liability in Srebrenica even for a lesser offense. But such a conclusion fails to consider that the Prosecution's inconsistent approach might have had an impact on the on the judges's findings.

In *Milošević*, Perišić was named as a member of the JCE. Had the Prosecution followed the same path, it could have brought genocide charges against Perišić under a JCE III theory. But following the Prosecution's decision to introduce a different legal qualification for the killings in Srebrenica—its choice not to mention the genocidal intent behind the killings—the Trial Chamber did not have to decide if Perišić knew of the principal perpetrators' genocidal intent and made a substantial contribution to genocide, let alone if he possessed it himself. Had the killings of the able-bodied Bosnian Muslim men from Srebrenica been characterized as genocide as in other ICTY cases, the judges would have had, at the least, to consider Perišić's complicity in genocide and his command responsibility for failing to punish the perpetrators; the Chamber would have been ruling on genocide rather than being restricted to crimes against humanity.<sup>†</sup> Of course, the other convictions themselves contribute to the historical record, but those individuals were serving in the VRS, whereas Perišić was at the top of the VJ command, answering to Milošević. His trial was thus an opportunity to consider the links from Srebrenica to Belgrade.

The result, then, is that another opportunity to explore Milošević's responsibility, through the prism of his colleagues and subordinates' responsibility, has been needlessly abandoned. In the *Milošević* trial, the Prosecution contended that Milošević had knowledge of the other JCE members' genocidal intent, or even possessed the requisite intent himself, and that he exerted his influence and control over the VRS leadership directly and through the VJ Chief of Staff—through Perišić. The Prosecution also asserted that "high level meetings of the SDC and of the Serb and Bosnian Serb leadership following Srebrenica are critical in their demonstration of Milošević's tacit approval of the atrocities."<sup>42</sup> Had the *Perišić* Prosecution used the legacy of the *Milošević* trial, evidence that Perišić was present at these meetings would have supported an inference



of his knowledge of the others' genocidal intent. This in turn would have also indirectly indicated Milošević's responsibility as Perišić's superior.

The Prosecution chose not to use against Perišić the very evidence it had relied on to show Milošević's liability for genocide in Srebrenica, even though that evidence ran through the VJ and the VRS, and therefore through Perišić. This suggests a decision by the Prosecution not to address in any way Perišić's potential liability for genocide even though he had been charged for all the same acts committed at Srebrenica, and even though more evidence indicating that the VJ and the VRS formed a single army had emerged since the *Milošević* trial:<sup>\*</sup> Although in *Milošević*, the Prosecution's case may have been weakened by lack of compelling evidence that Mladić and most of his officers were Belgrade's subordinates, in *Perišić* the Prosecution felt strong enough to demonstrate that Mladić and the other 1800 VJ officers sent to serve within the VRS commanding structures were his (and therefore Milošević's) de jure subordinates.

The *Perišić* case illustrated the Prosecution's ambivalence, already noticeable in its approach in *Milošević*, toward the nature of the relations between the VRS and the VJ, which swung between theories of "assistance" and "leadership:" on the one hand, Perišić assisting a friendly neighboring army with substantial means, and on the other, Perišić exercising command authority over the VRS leadership and structures. But in *Perišić*, the Prosecution expanded its ambivalence by ignoring evidence in its possession or provided by its witnesses in court. It insisted that the VRS did not function as part of the VJ.<sup>43</sup> Further, it characterized as assistance rather than instigation the fact that the decision to attack and take over Srebrenica was prepared in coordination with Perišić and the Užice Corps,<sup>44</sup> with Karadžić signing directives prepared for him by Belgrade,<sup>†</sup> to create the façade that Belgrade was not giving the orders. Yet Perišić was not indicted for his participation in the planning and preparation of an operation without which genocide would not have been committed in Srebrenica or for directing his subordinates to engage in criminal activities. The Prosecution contended only that the Chief of the Main Staff of the VJ was required to exercise his authority and responsibility to prevent and punish these activities as crimes against humanity.

In the *Perišić* trial, the Prosecution advanced a much more restrictive theory about the military chain of command than it did in *Milošević*. The Prosecution's delegation theory asserted that Perišić had superior authority and control to the extent that he had the material ability to prevent or punish offenses by VJ officers, but had no operational control over his subordinates in the VRS and the SVK. In other words, he assigned VJ officers, paid and promoted them, provided them with logistical assistance or training, and assisted them in the planning of unlawful shelling or attacks, but never gave them any implicit or explicit directions that led them to commit offenses; he had de facto delegated his operational control to the VRS commanders. It is not clear what this delegation means when the VRS commanders are themselves VJ officers, but in any case, the Prosecution's view was that VJ officers within the VRS were primarily under the authority of Karadžić, who, in his capacity as president of the self-proclaimed Bosnian Serb state, was both de jure and de facto the VRS supreme commander.<sup>45</sup>

The Prosecution still preserved for Perišić a line of responsibility for the same officers; as prosecutor Mark Harmon reminded the Chamber in his opening statement: "If General Perišić was aware that his subordinates had committed crimes while serving in the VRS and he was aware that President Karadžić failed to sanction those offenders, General Perišić's responsibility to do so was not extinguished because of Karadžić's indifference or his inaction. General Perišić was obliged to take action against his VJ subordinates."<sup>46</sup> But the primary responsibility for those officers rests with Karadžić.

In many ways, the *Perišić* case seems to have been structured to simplify the *Karadžić* Prosecution's case and to avoid conflicting evidence between them. It is indeed easier to demonstrate Karadžić's liability as the only VRS supreme commander than as a commander whose authority was from time to time overshadowed by Belgrade's leadership, exercised through Perišić, over Mladić and his Main Staff. If Belgrade proved to be the ultimate authority over Mladić and his closest associates, it would seriously harm the *Karadžić* case.\*

But although this strategy helps avoid conflict with *Karadžić*, it does little to illuminate broader truths about the Yugoslav conflicts. The *Perišić* Prosecution's theory of delegation of effective control—just like Stanišić's

and Simatović's delegation in Trnovo—does nothing to explain Belgrade's role: how and through whom the SDC decisions were being implemented in Bosnia, or to what degree Belgrade continued to exercise influence over its own VJ and MUP officers at Srebrenica. These questions were at the heart of the Prosecution's case in *Milošević* and are of crucial importance for the historical record.

Although at the beginning of the *Perišić* case the Prosecution promised to lift up the veil of "Milošević's elaborate deceptions" about Serbia's part in the war in Bosnia, it disregarded evidence previously available to it, suggesting that Perišić and Milošević may have had much more authority over the VRS. There is plenty of evidence showing that Karadžić's influence over the VJ officers serving in the VRS was sometimes very limited; the tensions between Karadžić and Mladić that began in 1993 and escalated into a conflict in 1995 were well documented in *Milošević* by witnesses' testimony confirming that Mladić was not listening to Karadžić, and that in mid-1995 Karadžić was trying to impose his control over the VRS through non-VJ officers who were members of his party, the *Srpska demokratska stranka* (Serbian Democratic Party or SDS).

When viewed against the evidence from *Milošević*, the *Perišić* and *Stanišić & Simatović* trials appear built on a series of contradictions that will not help in the search for the truth. The Prosecution's strategy appears to be aimed at accommodating evidence so that it matches its own surest theory in each case, instead of coordinating evidence across different trials. Even where the Prosecution has coordinated its approach, as with *Perišić* and *Karadžić*, it has done so to avoid damaging strategic contradiction, rather than to let the fullest and most truthful picture emerge—and it has largely abandoned any effort to describe Belgrade's role in coherent terms. The Prosecution's approach has resulted in fragmented narratives—contradictory theories about Belgrade's "substantial support" or "leadership" in conceiving and carrying out the JCE—and therefore lost an opportunity to answer the question of what ultimately was Milošević's and Serbia's responsibility.

The question we must consider is: Why would the Prosecution have done this?

### **III. Shielding Serbia from State Responsibility? The Political Context for Abandoning the *Milošević* Legacy, and Its Consequences**

The Prosecution's strategic choices in the post-*Milošević* trials have had the effect of dissociating Serbian and FRY officials from the Srebrenica genocide—despite compelling evidence of the direct involvement of both VJ units and Serbia's MUP—and thus minimizing the Milošević regime's leadership role in and responsibility for crimes in Bosnia. This was not merely a technical decision; instead, these choices may well illustrate a politicization of the judicial process—an effort to influence the way evidence should be interpreted outside and beyond the courtroom.

Although the ICTY deals exclusively with individual responsibility, as Shany explains in his chapter, international crimes committed by high state officials can also be attributed to the state itself. After Milošević's death, when trying the last officials of Milošević's regime, the Prosecution has declined to reopen the issue of genocide. This may have reflected doubts about the prospects for conviction, but it also has had the effect of ensuring that the trials say nothing about the highly sensitive issue of Serbian state liability for the acts of its officials in the Srebrenica genocide. This choice, which can be seen as a political one, not only contradicted the Prosecution's own earlier case against Milošević, but was entangled with the jurisprudence of another court.

During nearly the whole time that the Prosecution was investigating crimes in Bosnia, a parallel case was working its way through the ICJ, in which Bosnia accused the FRY, and later Serbia, of genocide. When the *Milošević* trial ended, the ICJ's *Bosnian Genocide* case was still going on. In its judgment issued on 26 February 2007, the ICJ found that, although it had violated its obligation to prevent and punish agents of the RS who committed genocide at Srebrenica, Serbia had not itself committed genocide. The ICJ judges were not convinced either that the *Škorpioni* were in fact acting under Belgrade's control or that the members of the VRS Main Staff who decided to kill the adult male population of the Muslim community in Srebrenica were under instructions from or effective control by Serbia.<sup>47</sup> The ICJ ruling also held that Serbia could not be held responsible for complicity in genocide because it was not



established “beyond any doubt” that the FRY authorities, at the time they were supplying aid and assistance to “the VRS leaders who decided upon and carried out those acts of genocide[,]” were “clearly aware that genocide was about to take place or was under way[.]”<sup>48</sup> The ICJ based its decision on the information available to it, which included the decisions of the ICTY and its publicly available evidence, but not the full transcripts of the VSO meetings, a point that has generated considerable controversy since the judgment was rendered.\*

The ICJ decision came down less than a year after Milošević’s death, and before any of the other cases of Belgrade leadership began. It seems, therefore, that the Prosecution confronted a dilemma, or at least an awkward decision: further trials of Belgrade leadership on genocide charges might, if successful, produce outcomes dramatically at variance with the decision in *Bosnian Genocide*, and in any event would rely on the VSO transcripts and other evidence presented in closed sessions that was not made available to the parties before the ICJ. Had any Serbian officials been convicted on genocide at the ICTY, Bosnia would have requested the reopening of its ICJ lawsuit and sought the evidence that had secured such a conviction.† The ICTY would have had then to decide, in the face of close and considerable scrutiny, whether to be an accomplice to hiding evidence or to disclose evidence that was provided by States under the condition of nondisclosure.

Thus in *Perišić* and *Stanišić & Simatović*, the Prosecution appears to have modified its earlier strategy at least partly in order to match its remaining cases with the ICJ findings, even though the ICTY and the ICJ do not have the same jurisdiction or the same rules of procedure and evidence. We cannot know the Prosecution’s rationale for avoiding all genocide charges in the subsequent Belgrade leadership trials—or even for failing to characterize Srebrenica as genocide—but one effect is clear: Serbia is not exposed through its agents to further state responsibility for genocide.

Nor is not only the Prosecution that seems to have undergone a shift since the *Milošević* case. The judges have also engaged in building a legacy that narrows or empties the legal concept of command responsibility in a way that may well contradict the very purpose of establishing international criminal jurisdiction: namely, that heads of

state, government ministers, army commanders and other powerful figures should not escape accountability after engaging in mass violence. In November 2012, the Appeals Chamber in *Gotovina & Markac* set standards that would lessen restrictions on the use of artillery in built-up areas. Then the *Perišić* Appeals Chamber set standards that would limit the legal risk to leaders who aid and abet allies or client forces by providing them with arms, ammunition or logistics that are used to commit crimes. Both of these appeals cases represent a shift away from robust efforts to link senior leaders to crimes in the field.

But although there may be prudential, political reasons for such a choice, it also has serious consequences, as it denies us all a definitive answer to a critical question: What was the role Milošević's Serbia played in the destruction of Yugoslavia? At his trial, the judges acknowledged that there was plausible evidence that might have shown Milošević was an essential architect of a criminal enterprise to force non-Serbs out of Croatia, Bosnia, and Kosovo and create a homogenous Serb state. But what has remained today from that record? The *Croatia* and *Kosovo* parts of the *Milošević* trial have been confirmed and even expanded, but the record related to Bosnia—surely the most contested, the most fraught of these conflicts, and the place that has suffered the most during the war—has been confounded by mutually inconsistent theories.

This crucial question about Belgrade's role in the crimes committed in Croatia and Bosnia—often wrongly perceived as designed to stigmatize Serbia—is of the utmost importance to understanding how the war happened, and what happened during and after the war. The ICTY trials have confirmed that mass violence was not spontaneous, but state-sponsored. These findings are crucial for the concerned societies to engage in reconciliation processes. But these difficult and painful processes may well be compromised by the confused messages emanating from The Hague. As Bieber's chapter suggests, retributive justice cannot on its own reconcile postwar societies, but in the aftermath of state-sponsored mass violence, the postwar authorities need to distance themselves from the criminal politics of the past in order to secure a lasting peace, and the criminal law can help in this process. But to do so, it must tell a consistent and truthful story shaped by the evidence; reshaping history to dilute state responsibility may discourage postwar state authorities and elites from breaking decisively with the past, or even encourage them to continue

these politics through different means, preventing stability and reconciliation.

Years after its termination, the *Milošević* trial appears to have offered the most comprehensive picture of the broad Belgrade-centered criminal enterprise that will ever be presented at the Tribunal. Since that trial ended, the Prosecution has deviated from the theory of its own flagship case: Evidence has been disregarded, and new evidence that should have strengthened the *Milošević* legacy was instead deployed to revise it downward. The absence of a subsequent judicial ruling on some of the most important questions raised by the Prosecution in the *Milošević* trial leaves now an even more bitter taste in the mouth; the feeling of an unfinished business has grown stronger among the victims who now suggest that “justice has died with Milošević.”<sup>49</sup>

Milošević’s death deprived the public and the victims of a judgment, but it was not he who killed the trial and the search of the truth. Trying Milošević as a head of state for a state-sponsored criminal enterprise necessarily raised the issue of state responsibility; the trial of his closest associates in that regime contained an identical risk. The *Milošević* legacy may have been laid aside in order to avoid reopening the issue of Serbia’s state responsibility for the Srebrenica genocide—but whatever the reason, the victims were deprived of a fuller truth about some of the most sensitive and controversial episodes of the conflict. Justice, when dealing with war crimes, is expected to contribute to an indisputable historical record aimed at helping communities come to terms with their recent history. The evidence brought before the ICTY in *Milošević* and its progeny was supposed to help shape how future generations assess the Yugoslav wars and Serbia’s role in them. But when politics infiltrates the judicial processes or enters the courtroom, there are no more indisputable records. The reconciliation process will be affected because the concept of reconciliation can only go hand in hand with the concept of truth.

*Milošević* and the subsequent trials against his regime’s officials and allies have shed light on the overall structures that led to three wars in the former Yugoslavia, but secrecy still covers much of the wars’ events and their logic. The superposition of different structures designed to hide the fact that Serbia was involved in the conflict and in the crimes committed to create an all-Serb state still must be scrutinized in order to establish if the JCE was carried out by a deeply decentralized leadership, as the

Prosecution now contends, or if the delegation of powers in the field was a deception meant to obscure Belgrade's ultimate responsibility, as the same Prosecution asserted during the *Milošević* trial. It is already obvious that the ICTY will close down without giving an answer to these questions. The *Milošević* trial had attempted to address these issues; deprived of a judgment, the victims and the world were expecting subsequent related trials to offer part of the answers. But at the end, the Prosecution's contradictions and its restrictive post-*Milošević* theory about the chain of command, coupled with the reductionist legal criteria on individual command liability the Appeal Chambers now applies, means the ICTY's jurisprudence as a whole is arriving at the conclusion, in line with the ICJ, that Serbia under Milošević and his top associates played no essential role in the criminal enterprise to force non-Serbs out of Croatia and Bosnia in order to create a homogenous Serb state.

Twenty years after the UN Security Council unanimously established it, the ICTY has failed to become the leading institution in the desperately needed fight not only against impunity but against the collectivization of guilt. Or rather, it has been instrumental in attributing responsibility for the appalling crimes perpetrated in the former Yugoslavia to the wrong kinds of individuals: Instead of focusing attention on those who masterminded mass violence far from the battlefield, the ICTY has turned into the leading tool to promote narrow standards of liability that shift guilt away from the leaders operating far removed from the crime base, and back onto people who made no decisions but carried out plans developed by others. This is surely in part a consequence of the Prosecution's strategic choices: With the theories it chose to advance, and their contradictions, the Prosecution not only failed to secure a conviction in several important cases, but more critically, it cannot explain how all of the cases should have fit together, how all of them could have been true. In the successor cases to *Milošević*, the Prosecution seemed more interested in securing convictions—though it has hardly succeeded in that—than in lifting the veil of deception. The Prosecution has failed to take this opportunity: It has abdicated the legacy of the *Milošević* trial.



## The Spider and the System

Milošević and Joint Criminal Enterprise

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*In order to hold Milošević responsible for genocide, the Prosecution opted to use the doctrine of joint criminal enterprise. JCE is a popular and serviceable device to accentuate the collective dimension of international crimes. Moreover, the choice of JCE was propitious for evidentiary reasons, as it relaxed the burden on the Prosecution to prove that Milošević harbored a special intent to destroy a group in whole or in part; under JCE, simple knowledge could suffice. However, precisely this final point turned out to be counterproductive, because it thwarted the Prosecution's previous efforts to portray Milošević as the spider at the center of the web, who acted in concert with the Bosnian Serb leadership to plan, prepare, and orchestrate atrocities.*

Although it is a natural inclination to blame the system in case of widespread systemic criminality,<sup>1</sup> there are good reasons for resisting this temptation. For one thing, hiding behind “the system” offers splendid opportunities to avoid individual responsibility, implying that, really, no one person could possibly be held directly responsible. Collective responsibility snares all in a common denunciation, whereas individual responsibility makes distinctions and releases the innocent from a shared stigma.<sup>2</sup> Against this backdrop, it is sensible to pay heed to the famous

dictum of the Nuremberg Tribunal that crimes are committed by men and not by abstract entities.<sup>3</sup>

On the other hand, one cannot ignore the collective dimension of systemic criminality. War crimes, crimes against humanity, and genocide—in rising order—require vast resources, meticulous planning, and the common and concerted effort of planners and willing executioners. Moreover, it is precisely the intoxicating collectivity that unleashes a special dynamism and earns systemic criminality its hideous and fearful reputation. As Drumbl also suggests, international criminal trials that only focus on individual contributions and responsibilities lose sight of this important dimension.

The *Milošević* trial reflects the eternal vacillations between individual responsibility and collective guilt. Prosecutor Carla Del Ponte emphasized the individual component in her opening statement at the trial:

The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted on the basis of his individual criminal responsibility. No state or organization is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, even the crime of genocide. It may be tempting to generalize when dealing with the conduct of leaders at the highest level, but that is an error that must be avoided. Collective guilt forms no part of the Prosecution case.<sup>4</sup>

At the same time, she was obviously not blind to the fact that Milošević could have committed the crimes he was accused of only by acting in concert with others and by employing the vast human resources he had at his disposal as head of state.\* Thus despite her rhetorical insistence that the individual man was on trial, the implicit task facing the Prosecution was to prove, first, that Milošević had acted as part of a collective, and second, that he had been at the apex of this collective.

In theory, three concepts of criminal responsibility were available, each with its advantages and drawbacks. The Prosecution could have chosen to charge Milošević with aiding and abetting (or complicity in) genocide. The evidential hurdles would have been surmountable, but the option was not very popular from a public relations perspective as it would trivialize Milošević's involvement by portraying him as a secondary figure. The second possibility, superior responsibility, would have involved problems of hierarchy, as the doctrine requires that the superior exercises “effective control” over his subordinates.<sup>5</sup> Milošević was not the

de jure superior of the Bosnian Serb leadership, and as Hartmann and Prelec both suggest, the Prosecutor would have faced grave problems in proving that Milošević wielded complete power and authority over Karadžić and Mladić.

Ultimately, the Prosecutor opted for the joint criminal enterprise or JCE doctrine—the favorite toy of prosecutors in the international realm because of its extremely broad reach, but also the tool that, for the same reason, best captures the collective dimension of systemic criminality.<sup>†</sup>

As several other authors have shown, the gist of JCE is that the members of the enterprise share a common frame of mind, and unite to achieve a goal that involves criminal acts (or is itself criminal), and each of them offers a material contribution in order to accomplish that goal. JCE doctrine has a mixed pedigree, combining features of conspiracy and complicity;<sup>‡</sup> however, the mens rea and *actus reus* elements of JCE's close relatives have been considerably diluted in the new creation. Unlike conspiracy, JCE does not require an explicit agreement between or among the participants in the common venture.<sup>6</sup> Moreover, the common purpose is weakened in that each participant in a JCE can even be held responsible for crimes outside the common plan that were a natural and foreseeable consequence of executing the plan.<sup>7</sup> Finally, various Trial Chambers of the ICTY have been evasive in indicating what kind of material contribution to the common plan an accused has to make, effectively hollowing out the *actus reus* requirement<sup>8</sup>—a dilution purposefully undertaken to broaden the scope and applicability of the doctrine as much as possible.<sup>9</sup>

However, the *Milošević* trial demonstrates that the doctrine's elasticity has its limits, and courts that overstretch the concept of JCE, risk losing credibility. The restrictive parameters in *Milošević* were the charge of genocide—with its special intent requirements—and the Accused's prominent position at the center of power—but also far from the killing fields. There was an inherent contradiction between the Prosecution's urge to present Milošević as a devious spider in the web, determined to accomplish the ethnic cleansing of Bosniaks, and its use of a concept of criminal responsibility that precisely served to relax both the stringent mens rea and the need for unanimity among the JCE's members.

In its decision on the *Amici Curiae's* Rule 98bis motion for acquittal at the end of the Prosecution case, the *Milošević* Trial Chamber considered if



JCE III—which effectively imputes the intended acts of one member of the common plan to others who did not intend them—could be reconciled with genocide’s requirement of a special intent to destroy a group in whole or in part.<sup>10</sup> The Trial Chamber referred to a decision of the Appeals Chamber in the *Brđanin* case, which held that there is no incompatibility between the requirements of genocide and the mens rea needed for conviction under JCE III.<sup>11</sup> The *Milošević* Trial Chamber subsequently held that it was therefore “not necessary for the Prosecutor to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability.”<sup>12</sup> Similarly, following earlier decisions, the Chamber held that neither an accomplice nor a military commander needed to possess the special intent for genocide.<sup>13</sup>

Now, in the abstract there is nothing wrong with these findings. It is only natural that in a larger group people will have different levels of knowledge and aspirations, even if they have—silently—agreed to embark on a common course of action.<sup>14</sup> And so, in a sense, the Chamber’s flexible reading of both JCE and genocide not only fit the Tribunal’s previous jurisprudence but also responded to the complexity of the Yugoslav wars. But in the specific context of the *Milošević* trial, this doctrinal move was rather too ecumenical: It did not tally with the Prosecution’s efforts to portray Milošević as the devious architect of a genocidal policy.

To begin with, there are, of course, factual challenges to the Prosecution’s account of Milošević’s role. As the documentary evidence Prelec reviews demonstrates, Milošević did not spur and control the massacres in Bosnia—he may well have been aware of the killings, but he did not consent to them. Milošević by no means agreed with the Bosnian Serb leadership’s decision to shell and siege Sarajevo,\* nor are there strong indications that Milošević wielded full control over the leading Bosnian Serbs or acted in concert with them in the preparation of heinous crimes.\* At a more structural level, Hartmann’s observations are equally devastating to the Prosecution’s claim that Milošević occupied a central position in a genocidal JCE. They also show us something about the problems that, ironically, JCE generates for anyone trying to forge a coherent strategy to prosecute multiple actors for a related set of crimes.



Hartmann contends that the Prosecution's initial tactic was to demonstrate that Stanišić and Simatović were the essential go-betweens linking Milošević and the Bosnian-Serbian leadership. Stanišić and his deputy Simatović had "controlled and directed Serbia's covert Special Forces in some of the most brutal campaigns against non-Serb civilians[.]" and, according to witnesses, "[i]t was through Stanišić that Milošević exerted control over Mladić and Karadžić, and also controlled the Serbian SDB."<sup>15</sup> Their position as intermediaries was not only indispensable to the factual projection of Milošević's power but also an irreducible link in the legal argument, because, as Hartmann correctly explains, "[i]f Milošević was able to foresee the risk of genocide, as the charges against him implied, logically so did Stanišić and Simatović, who were informing him of everything that occurred in the field."<sup>16</sup> The Prosecution's theory placed Milošević at the center of a web of criminal relationships, but the logic of JCE required that there be others in the web. After all, it is only through his intermediaries that Milošević could have the much reduced level of knowledge about events in Bosnia that even a doctrinally relaxed JCE theory requires.<sup>†</sup>

However, in its subsequent case against Stanišić and Simatović, the Prosecution suddenly changed course, "treating the Srebrenica genocide as a parallel criminal plan developed separately from the overarching JCE and with a separate and specific intent—in this case, a genocidal one—which was not shared by Stanišić and Simatović."<sup>17</sup> It is of course a matter of speculation why the Prosecution reversed its initial point of view—Hartmann suggests that the ICTY wanted to protect the *Karadžić* case and did not wish to contradict the ICJ's findings in *Bosnian Genocide* by continuing to assert the active involvement of the Serbian state in the genocide at Srebrenica—but the division of the JCE fatally affects the pristine portrayal of Milošević as a spider weaving a web of genocidal purpose.

Two elements—one of a factual nature and one the consequence of a deliberate change in prosecutorial policy—refute the image of an all-encompassing JCE engaged in genocide and headed and steered by Milošević. First, the information available, aptly presented by Prelec, shows Milošević in a less prominent leadership role for the crimes in Bosnia, picturing him at most as a reluctant or indifferent accomplice who

was aware of the possibilities of great harm but did not consent to the course of events. Ironically, the Prosecution's use and interpretation of JCE, relaxing mens rea for genocide—which subsequently was condoned by the Trial Chamber—allowed this different presentation of Milošević's position. However, this ultimately proved to be counterproductive as it eroded the Prosecution's previous efforts to portray Milošević as the *auctor intellectualis* of genocide. But the major blow to the structural cohesion of the JCE has been administered by the Prosecution itself, which, by eliding the indispensable links between Milošević and the acts of genocide, has caused the whole JCE to fall apart.

In the end, we have to conclude that the abstract logic of legal constructs such as JCE does not always square with murky and complicated realities. All is not lost—we are still able to say legally coherent and consequential things about the role of Belgrade in the Yugoslav wars: As Hartmann also shows, and Nielsen too, there is compelling evidence revealing that Milošević had a much tighter grip on people and events in Croatia and Kosovo. But to hold him posthumously responsible for the genocide in Bosnia would require us either to ignore much of the factual evidence, or to accept an extremely broad version of JCE, arguably incompatible with the crime of genocide itself. An alternative reading is available—that Milošević engaged in an aggressive policy toward his neighbors, and that some individuals over whom he wielded insufficient control benefited from the situation in order to accomplish their own dismal goals—and in the logic of the law, such an alternative must have consequences. The conclusion that Milošević was no Hitler may be disappointing to those who search for one person incarnating all evil, but that disillusionment is the price we pay for our determination not to let legal constructs take control of and distort historical truth.

## PART SEVEN

### Biopsy THE LEGACIES OF *MILOŠEVIĆ*

The legacy of the *Milošević* trial within the professional and disciplinary confines of ICL is undeniable, and considerable: a greatly revised set of norms for self-representation, most obviously; but more broadly, sobering lessons—to some extent absorbed and accommodated—concerning the perils of trying senior political figures. The tighter grip shown by judges in more recent trials of prominent accused is in part a practice directly drawn from the lessons of *Milošević*, in part a consequence of changed rules—such as the streamlined Rule 98*bis* process—that themselves derive from the experience of that trial. Even the pressure to shorten trials—more felt than acted upon—derives principally from the recognition of how long the *Milošević* trial was, and how vulnerable such processes are to the actuarial vagaries of human biology. As much as anything, the mere fact of the trial, although uncompleted—the indictment of a sitting head of state—assures *Milošević* a place of precedence: a proof and assurance, just as the unperfected *Pinochet* extradition hearings earlier provided, that such things can indeed be done.

Yet even within the Tribunal, the trial's influence is surely less than one would have expected. There is no *Milošević* judgment to be cited. There are only the interim and procedural markers laid down—and these are deployed and relied upon—but little from the evidence itself has had much purchase in the surrounding jurisprudence. Even the theories on which the Prosecution relied, and the contours of the JCE it described, have been radically altered and reduced in subsequent trials of senior

Serbs, whether from Bosnia or Belgrade. Equally, though, this may be read as a legacy of the trial's termination, since in the absence of a verdict actually ruling on the most comprehensive and ambitious version of the JCE, the Prosecution evidently drew conclusions about that version's necessity, desirability, or viability for the remaining cases.

The broader political, social, and cultural legacy in the region is more ambiguous, as several of our chapters have shown: Though their views are diverse and often conflicting, none, it seems, find that the *Milošević* trial had a decisive impact on attitudes toward the conflict, toward former countrymen, or toward reconciliation. Of course the trial is not the Tribunal, even less the broader array of judicial measures undertaken in the wake of Yugoslavia's violence, and to which hopes for transformation have sometimes been attached. Yet if not a dispositive fact in itself, it is surely worth note that this, the single most important trial, is so singularly absent from the discourses and the claims made, even today, about how law brings a fuller peace, if it does, after war subsides.

And this itself is perhaps the most important legacy of this troubled, terminated trial: a contribution to our debates about the ICTY and the broader ICL project, because that legacy was supposed to be clearer and more confident than it has turned out to be. The *Milošević* trial was supposed to do and be much more, and that it has not, and is not, is of the greatest consequence.



# Time Line with Chronological Index: The *Milošević* Trial in Context

This index places the events discussed in this book in chronological context, and allows the reader to find pages that address a given aspect of the *Milošević* trial, the Tribunal's operations, or significant events in Yugoslavia's dissolution. (For each entry, the chapter's author and the page number is given; references in the first four chapters are identified as 'Intro.')

Significant or representative incidents for which Milošević was charged, and other cases to which his was related, are marked with “(M).”

NB: For some entries, the events described occurred over a longer period following the date given.

## 1. Yugoslavia History: Background, Crisis, War, and Crimes

DATE	EVENT	CHAPTERS
late antiquity	Roman provinces; division between western and eastern imperial zones and later between western and eastern Christian influences	
From 6th c.	Slavic-speakers settle in region, soon predominate;	Intro 4-5

	predecessors of Albanians already present	
Middle Ages	Medieval banates and kingdoms of Bosnia, Croatia, and Serbia	Intro 5
28 June 1389	Battle of Kosovo Polje; later enters Serbian national mythology	
From 15th c.	Imperial dominance: Ottoman Empire in south, where Muslim populations develop, Habsburgs in north	Intro 5-6
1718	Treaty of Passarowitz established stable Habsburg- Ottoman frontier	Intro 5
1809–13	Napoleonic Illyria established	Intro 6
19th c.	Ottoman decline; rise of Balkan states and pan-Slavic nationalism	Intro 6
1804–15	Formation of autonomous Serbia	Intro 6
1844	<i>Načertanije</i> , document outlining Serbian policy of national expansion written	Intro 6
1868	<i>Nagodba</i> : autonomous Kingdom of Croatia within Hungary recognized	Intro 6
1878	Full independence of Serbia, Montenegro; Habsburg control of Bosnia	Intro 6

1908	Austria-Hungary annexes Bosnia	Intro 6
1912–13	Balkan Wars: expansion of Serbia and Montenegro to include Macedonia, Kosovo, and Sandžak; independent Albania	Intro 6
1914–18	First World War: Austro-Hungarian occupation of Serbia and Montenegro; regimes in exile fight with Allied Powers	Intro 6
<b>Yugoslavia</b>		
1918	First, Royal Yugoslavia: new Kingdom of Serbs, Croats, and Slovenes formed, dominated by Serbian monarchy and army	Intro 10
1920s	Political paralysis and factional disputes, partly along ethnic lines	Intro 10
1929	Dictatorship; state renamed Yugoslavia and reorganized into banovinas	Intro 10
1934	Assassination of King Alexander	
1939	<i>Sporazum</i> : political compromise creates large Banovina of Croatia	Intro 10
6 Apr. 1941	Germany and allies invade Yugoslavia	Intro 10

1941–45	Yugoslavia occupied; Independent State of Croatia systematically kills Serbs, Jews, Gypsies; Partisan and Chetnik resistance movements fight civil war; one million die, mostly from intra-Yugoslav fighting	Intro 10-11
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## **SFRY**

29 Nov. 1943	Second, Socialist Yugoslavia: Partisan leader Josip Broz Tito establishes federal state at AVNOJ conference; fighting until Apr. 1945	Intro 11
29 Nov. 1945	Monarchy formally abolished, open Communist rule	Intro 11
Late 1940s	Period of consolidation and violent repression, especially in Kosovo	Intro 11
1948	Break with Stalin; independent, nonaligned Communist country	Intro 11-12
1950s	Refinement of Yugoslav model: decentralized economic governance, worker self-management, defined space for national identities, Communist control under Tito's authority	Intro 12
1960s	Economic prosperity;	Intro 12



	decentralization of governance and economy	
1963	Revised constitution increases decentralization	Intro 12
1966	MUP chief Ranković expelled; relaxation of repression	
1968	First identification of “Muslims by nationality” on SFRY census	Intro 11
1971	Croatian Spring; Tuđman, among others, imprisoned	
21 Feb. 1974	New constitution further decentralizes Yugoslavia, gives broad autonomy to Kosovo and Vojvodina; Tito president for life	Intro 14
<b>1980s</b>		
4 May 1980	Tito dies; power devolves to collective presidency	Intro 14
	Economic crisis intensifies; IMF imposes destabilizing conditions; decline in strategic importance. Rise in expressions of nationalism	Intro 14-15
<b>early to mid-1980's</b>		
Mar. 1981	Kosovar Albanian protests calling for republican status, suppressed by federal intervention	Intro 15

## **1983**

- Apr. Izetbegović and others imprisoned for nationalist activity
- Aug. Ranković's funeral becomes site of spontaneous Serb protests
- Sept. 1986 SANU Memorandum leaked, Intro 15 describes "genocide" against Kosovo Serbs; condemned by Serbian Communist hierarchy

## **1988**

- 6 Oct. Anti-Bureaucratic Revolution: Vojvodina leadership replaced with Milošević loyalists Intro 15, 50; Krasniqi 215
- Nov. Miners' protest in Kosovo; Kosovo leadership replaced with Milošević loyalists

## **1989**

- 10 Jan. Montenegro's leadership replaced—Milošević controls half of SFRY Presidency seats Intro 16
- Feb. Trepča miners' strike in Kosovo, supported by Croatia and Slovenia
- 3 Mar. SFRY Presidency declares special measures in Kosovo

23 Mar.	Kosovo Parliament, surrounded by tanks, approves Serbian constitutional changes (Serbia approves changes on 28 Mar.)	Intro 15
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25 Mar.	Karađorđevo meeting: Milošević and Tuđman discuss status of Bosnia	
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## 1990

23 Jan.	14th Party Congress: LCY dissolves as Slovenian and Croatian parties withdraw— effective end of SFRY	Intro 16
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Apr.	Federal forces removed from Kosovo; Serbian police brought in; throughout year, ethnic Albanians removed from public institutions	
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8 Apr.	Slovenian elections: Kučan and DEMOS coalition dominate	Intro 17
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22 Apr.	Croatian parliamentary election: Tuđman and HDZ dominate	Intro 16
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2 July	Kosovo parliamentarians declare own entity; Serbia suspends Assembly	
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16 July	Serbian Communist party reforms itself as Socialist Party of Serbia under Milošević's leadership	Intro 17
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Aug.	Log Revolution in Krajina: local Serb police and militias, aided by Belgrade, reject Croatian authority	Intro 17
Sept.	Kosovo parliamentarians declare Republic of Kosova	
28 Sept.	New Serbian Constitution (the Milošević constitution)	Intro 17
18 Nov.	Bosnian election: nationalist parties (SDA, HDZ and SDS) dominate	Intro 16-17
22 Dec.	New Croatian Constitution asserts right of secession	Intro 17
23 Dec.	Slovenian independence referendum passes by overwhelming majority	Intro 17
<b>1991</b>		
various	in Kosovo, Albanian professors, teachers fired, students expelled; by year's end, Albanian-language educational system effectively dismantled	Krasniqi 215
16 Jan.	Milošević meets with ambassadors, moots Slovenia's independence	
24 Jan.	Milošević meets secretly with Slovenia's Milan Kučan	Intro 16
2 May	Croatia: Borovo Selo: Serb paramilitaries and Croatian police clash	Intro 18



19 May	Croatian referendum on sovereignty	Intro 18
25 June	Slovenia and Croatia declare independence	Intro 18
27 June	Ten-Day War: JNA forces enter Slovenia	Intro 18
June	Croatia: Knin: detention center established, active through Feb. 1992; 120 internees tortured, starved, and subjected to sexual assault (M)	
7 July	Brioni Agreement: ceasefire in Slovenia, JNA withdraws; Slovenia and Croatia postpone independence for three months	Intro 18
Aug.	Battle of Vukovar begins	Intro 18
26 Aug.	London Peace Conference begins	Bassiouni 94
20 Sept.	Croatia: Tovarnik: non-Serbs flee, are forced to dig trenches (M)	
25 Sept.	SC Res. 713 imposes arms embargo for territory of SFRY	
Sept.	Kosovar Albanians hold unrecognized referendum for independence	
Sept. 1991–Feb. 1992	Croatia: Erdut: Arkan's <i>Tigrovi</i> interrogate and kill	

	107, bodies thrown in Danube or buried in mass graves (M)	
Fall 1991	Croatia: Trpinja and Čelje: Arkan's <i>Tigrovi</i> terrorize civilians, 12 killed in Čelje (M)	
1 Oct.–7 Dec.	Croatia: Dubrovnik shelled, 43 civilians killed, historic buildings damaged (M); Ravno in Bosnia also shelled	Intro 18; Lamont 208
7–21 Oct.	Croatia: Plitvička Jezera: 10 civilians killed; Korenica detention camp (M)	
8 Oct.	Croatia severs relations with SFRY as independence becomes effective	Intro 18
15 Oct.	Divided Bosnian Parliament passes memorandum on sovereignty	Intro 19
18 Oct.	Croatia: Lovas: Serbs force 50 Croats to walk through minefield, open fire—21 killed (M)	
18 Oct.	Carrington peace plan presented	
18 Nov.	Croatian Republic of Herzeg-Bosna declared	Intro 20
21 Oct.	Croatia: Hrvatska Dubica: Serbs execute 56 civilians at Krečane (M)	

24 Oct.	Serb parliamentarians form Assembly of the Serb People of BiH	Intro 19
28 Oct.	Croatia: Lipovača: Serb forces kill seven civilians in village (M)	
12 Nov.	Croatia: Saborsko: Serb forces kill 29 civilians and level village (M)	
18 Nov.	Croatia: Škabrnja: Serb forces torture and kill 38 civilians; executions continue until Feb. 1992 (M)	
18 Nov.	Fall of Vukovar after long siege (M)	Intro 18; Lamont 206-207
20 Nov.	Croatia: Vukovar: 200 taken from hospital and executed at Ovčara (M)	Intro 18; Lamont 204ff
13 Dec.	Croatia: Voćin: <i>Beli Orlovi</i> kill dozens (also killings in Nov.) (M)	
19 Dec.	<i>Republika Srpska Krajina</i> declared in Serb-held areas of Croatia	Intro 18
21 Dec.	Croatia: Marinovići at Bruška: Martić's police kill 10 (M)	
23 Dec.	First recognitions of independent Croatia	Intro 18
7 Dec.	First Badinter Commission decision published, declaring	Intro 19

Yugoslavia in dissolution  
(other decisions followed)

**1992**

3 Jan.	Ceasefire between Croatia and Yugoslavia	Intro 18
9 Jan.	<i>Republika srpskog naroda</i> <i>BiH</i> declared, predecessor of <i>Republika Srpska</i>	
15 Jan.	Many states recognize Slovenia and Croatia	Intro 18
21 Feb.	SC Res. 743 creates UNPROFOR	Intro 18
29 Feb.–1 Mar.	Bosnian referendum: Bosniaks and Croats overwhelmingly support independence, Serbs boycott	Intro 19-20
Mar.	Bosnia: intensifying violence —massacres in Bjeljina, fighting in Brod	Intro 20-21
18 Mar.	Carrington-Cutiliero Plan, aimed at preventing wider conflict in Bosnia; Izetbegović withdraws signature on 28 Mar.	
1–2 Apr.	Bosnia: Bjeljina: first municipality taken over by Serbs; 48 Muslims and Croats killed in initial violence, executions continued through Sept.; Batković detention center established (M)	



5 Apr.	First instances of shelling at Sarajevo	Intro 20; Waters 303-305; Prelec 362-364
6 Apr.	E.C. recognizes Bosnia; full-scale fighting in Bosnia begins; siege of Sarajevo begins (M); Serbs make rapid advances throughout Bosnia	Intro 20
7 Apr.	Bosnia recognized by the United States; independent <i>Republika Srpska</i> declared with Karadžić as President	Intro 19, Surroi 228
8 Apr.	Bosnia: Zvornik: town attacked; in June, 700 killed at Karakaj technical school, 190 at Gero's slaughterhouse; at Čelopek Cultural House, detainees forced to sexually abuse each other (M)	
22 Apr.	Bosnia: Bosanska Krupa: town shelled, civilians detained in Petar Kočić School and tortured with electric shocks (M)	
28 Apr.	Serbia and Montenegro form the FRY	Bieber 434; Várady 444
30 Apr.	Bosnia: Prijedor: Serbs take town, incarcerate thousands at Omarska, Keraterm, and Trnopolje, where they are beaten, raped, tortured; over	Nielsen 335, 336

time more than 1,500  
killings in municipality (M)

- |       |   |                           |
|-------|---|---------------------------|
| Apr.  | Bosnia: Foča: After Serb takeover, men held at KP Dom detention facility, and hundreds killed; dozens of Muslim women enslaved and systematically raped, traded among Serb soldiers (M) | Boas 110                  |
| Apr.  | Bosnia: Brčko: non-Serbs expelled, Luka camp established, Muslims systematically tortured and killed; Goran Jelisić, the Serbian Adolf, active (M)                                      | Waters 310 (re Luka camp) |
| Apr.  | Bosnia: Goražde: siege begins; Serbs obstruct aid and water (M)   |                           |
| 4 May | Croatia: Grabovac: five civilians arrested and killed (M)   |                           |
| 6 May | Bosnia: Banja Luka: Ferhadija Mosque, other mosques destroyed (M)   |                           |
| 7 May | Bosnia: Crkvina: 50 Croats and Muslims detained in agricultural cooperative, some killed, others forced to bury bodies (M)  |                           |
| 9 May | Bosnia: Bratunac: 65 Muslim civilians killed in Glogova (M)   |                           |

12 May	RS Assembly determines six strategic war aims	Intro 21
19 May	JNA forces withdrawn from Bosnia, many transferred to VRS, which Belgrade continued to support	Intro 20
19 May	Bosnia: Višegrad: Following Serb takeover, hundreds of Muslims executed and thrown from bridges into the Drina (M)	
19 May	Bosnia: Čajniče: dozens of detainees at hunting lodge massacred (M)	
22 May	Croatia and Bosnia admitted to UN	
25 May	Rugova President of unrecognized Republic of Kosova	Intro 15
25 May	Bosnia: Sanski Most: Serbs take town, large-scale killings; Betonirka camp established, internees beaten, given contaminated food (M)	Nielsen 335, 336
30 May	SC Res. 757 places widespread trade embargo on FRY	
May	Bosnian Muslim forces burn Serb villages around Bratunac, thousands of Serbs	

flee; killings continue until  
Feb. 1993

- 1 June Bosnia: Ključ: Serbs take town, non-Serbs arrested and detained (M)
- 3 June Bosnia: Teslić: civilians detained, regularly beaten, women raped (M)
- 10 June Bosnia: Kotor Varoš: Serbs take over town, intern Muslims and Croats in detention centers, where some are raped or executed (M)
- 10 June Bosnia: Bileća: After Serb takeover, non-Serbs detained, subjected to electric shock and beatings (M)
- 17 June Bosnia: Gacko: Serbs attack villages, killing 130 civilians (M)
- 19 June Fighting begins between Bosniaks and Croats in Bosnia
- 22 June Bosnia: Dubrovaci: 44 women and children killed in basement of Kilavci heating plant; five others held for years and raped (M)
- 25 June Bosnia: Kalovnik: Muslims detained, beaten, raped, and



	killed; from August, shelling of neighboring villages (M)	
June	Bosnia: Bihać: siege begins, villages destroyed, camps established (M)	
June	Bosnia: Prnjavor: mosque in Puraći destroyed, non-Serbs expelled (M)	
June	Bosnia: Vlasenica: Serbs establish Sušica detention camp; 140 killed in September, women raped (M)	
June–Aug.	Bosnia: Bosanski Novi, stadium: 700 Muslims detained, beaten (M)	Nielsen 335, 336
June–Sept.	Bosnia: Rogatica: Rasadnik detention center established (M)	
June–Dec.	Bosnia: Manjača camp: 3,000 incarcerated, starved (M)	
10 July	Bosnia: Biljani: 30 executed in elementary school (M)	
16 July	Bosnia: Pilica Farm: hundreds detained, mistreated or murdered (M)	
6 Aug.	Independent Television News reports on conditions in Omarska camp, showing film of emaciated prisoners	

21 Aug.	Bosnia: Korićanske Stijene: 200 Muslims executed, thrown in ravine (M)	
26–27 Aug.	London Conference on Bosnian crisis	Intro 3-4
16 Nov.	SC Res. 787 strengthens trade embargo on Serbia and Montenegro	
<b>1993</b>		
31 Mar.	SC Res. 816 authorizes NATO enforcement of no-fly zone over Bosnia	
8 Apr.	UN admits former Yugoslav Republic of Macedonia (FYROM)	
16 Ap.	Bosnia: Ahmići: HVO forces attack villages around Vitez; villages shelled, civilians forced to dig trenches	
Apr.–May	SC Res. 819 and 824 declare Srebrenica, Sarajevo, Tuzla, Žepa, Goražde, and Bihać safe areas	
25 May	SC Res. 827 establishes ICTY (following SC Res. 808 in Feb.) (see ICL/ICTY time line)	Intro 25; Bassiouni 99; Bieber 350
14 Apr.	Full-scale fighting breaks out between Bosniaks and Croats in Bosnia; Mostar divided, Bosnian government	Intro 20

	controls 10 percent of territory	
6 May	Vance-Owen plan rejected by Prelec 362, 372 Bosnian Serb Assembly	
8 June	Bosnia: Maline-Bikoši: Mujahideen forces kills captive HVO forces	
29 Aug.	Owen-Stoltenberg plan, rejected by Bosnian government	
23 Oct.	Bosnia: Stupni Do: HVO attack, kills 37 civilians, village destroyed	
14 Nov.	Drina plan agreed: RS, RSK and FRY outline war aims	Nielsen 342
<b>1994</b>		
5 Feb.	first Markale massacre in Sarajevo kills 60 (M)	Waters 304
8 Feb.	NATO begins to enforce no-fly zone over Bosnia	Prelec 356
1 Mar.	Washington Agreement ends Bosniaks-Croat fighting, forms Federation	Intro 24, Prelec 372
Apr.	First NATO bombing action against Bosnian Serbs	Prelec 356, Greenawalt 382
4 Aug.	Yugoslavia closes border with RS and imposes embargo	
28 Aug.	Contact Group peace plan rejected by Serbs in	

## referendum

### 1995

1–3 May	Operation Flash: Croatia retakes Western Slavonia	Intro 24; Lamont 205; Prelec 368
26 May	Bosnian Serbs hold UN peacekeepers to prevent airstrikes, to 19 June	Intro 24
11–22 July	VRS takes UN-protected safe areas of Srebrenica and Žepa; more than 7,000 Bosniaks massacred (M); killings by <i>Škorpioni</i> at Trnovo filmed	Nielsen 342; Prelec 370; Hartmann 471
21 July	Bosnia: Kamenica: Mujahideen behead Serb detainees; 52 killed in Sept.	
4–8 Aug.	Operation Storm: Croatia retakes Krajina, Serb population flees	Intro 24, 59; Lamont 206-207
28 Aug.	Second Markale massacre (M); NATO begins Operation Deliberate Force	Waters 304
21 Nov.	Dayton Accords: under U.S. auspices, Milošević, Izetbegović, and Tuđman agree to decentralized state with international supervision and NATO presence; Bosnian war effectively ends	Intro 24-25, 28; Bassiouni 101; Surroi 228; Trix 235; Prelec 356, 375; Greenawalt 381
21 Nov.	SC Res. 1022 suspends UN	



sanctions against FRY and RS

- |         |   |                                      |
|---------|---|--------------------------------------|
| 14 Dec. | Dayton Peace Accords officially signed in Paris           | Bassiouni 101;<br>Greenawalt 381-383 |
| 6 Dec.  | Milošević address to VJ leadership                        | Prelec 356-358                       |
| 20 Dec. | SC Res. 1031 authorizes NATO-led IFOR to replace UNPROFOR |                                      |

## **1996**

- |               |  |             |
|---------------|--|-------------|
| 22 Apr.       | First KLA attacks in Kosovo; swift reprisals from Serb forces  | Nielsen 334 |
| 1 Oct.        | SC Res. 1074 ends sanctions against FRY  |             |
| 9 Sept.       | FRY recognizes Croatia   |             |
| 14 Sept.      | First postwar elections held in Bosnia under international supervision; nationalist parties dominate |             |
| 4 Oct.        | FRY recognizes Bosnia  |             |
| 3 Nov.        | Serbian local elections; fraud allegations and protests follow                                       |             |
| 12 Nov.       | Erdut Agreement: Eastern Slavonia under transitional UN authority                                    |             |
| Winter 1996-7 | Mass demonstrations in Belgrade against Milošević regime   |             |

## **1997**

- |          |  |              |
|----------|--|--------------|
| May      | Milošević attends Serbian SDB ceremony at Kula | Hartmann 471 |
| 21 Sept. | Serbian parliamentary elections                |              |

## **1998**

- |          |  |  |
|----------|--|--|
| Jan.     | Eastern Slavonia reverts to Croatian sovereign control   | Intro 28; Prelec366-367                    |
| 5 Mar.   | Jashari family massacred in Kosovo; in March, major fighting between KLA and Serbian forces, including VJ                | Surroi 224                                 |
| 31 Mar.  | SC Res. 1160 condemns Serbian use of force against Kosovars, imposing an arms embargo on the FRY                         |  |
| 15 May   | Rugova and Kosovar “G-5” meet with Milošević in Belgrade   | Williamson 86-87; Surroi 222-224; Trix 237 |
| 23 Sept. | SC Res. 1199 demands ceasefire, withdrawal of Serb forces  |  |
| 12 Oct.  | NATO activation order for bombing issued   |  |
| 16 Oct.  | Kosovo Verification Agreement initiates short-lived ceasefire; by year’s end, roughly 250,000 ethnic Albanians displaced | Intro 25; Williamson 78, 80                |

## **1999**

15 Jan.	Račak (Rečak): 45 Kosovar Albanians killed by Serb forces (M)	Intro 25; Williamson 77-79, 88
18 Jan.	Arbour denied entry to Kosovo	Williamson 79-82
18 Mar.	Rambouillet negotiations fail	Intro 25; Williamson 80; Nielsen 343-344
20 Mar.	Kosovo Verification Mission ordered to withdraw from Kosovo	Williamson 80
23 Mar.	FRY declares imminent threat of war, declares state of war on 24 Mar.—Milošević gains de jure powers	Williamson 80
24 Mar.	NATO initiates bombing campaign against FRY; Serb forces massively escalate deportations and attacks in Kosovo; in March and April, hundreds of thousands of Albanians are forced out of Kosovo	Intro 24, 25, 26; Williamson 80, 86; Bassiouni 100; Krasniqi 215; Greenawalt 383
24 Mar.–14 Apr.	Uroševac (Ferizaj): Serb forces shell and attack several villages (M)	
25 Mar.	Prizren: villages attacked in Serb offensive; population of town expelled from 28 March (M)	
25 Mar.	Bela Crkva (Bellacërka): male population executed	Williamson 88

(M)

- 25 Mar. Padalište (Padalishte) in Istok (Istog): Serb forces kill 20 (M) Williamson 88
- 25 Mar. Ćirez (Qirez): women sexually assaulted, bodies thrown into well (M)
- 25–26 Mar. Srbica (Skënderaj): Serb forces attack several villages (M) Williamson 88
- 26 Mar. Mala Kruša (Krushë e Vogël): 105 men shot and burned in house (M) Williamson 88
- 26 Mar. Suva Reka (Suhareka): Berisha compound attacked, 44 killed in coffee shop; some bodies removed and reburied at Batajnica in Serbia (M) Trix 232, 241
- 27–28 Mar. Peć (Peja): thousands expelled, houses burned (M)
- 28 Mar. Izbica: massacre of over 130 Kosovars (M) Trix 230, 241-242, 245
- 29 Mar. Dečani (Deçan): Serb forces expel populace, sexually assault women (M)
- 31 Mar. Arbour assembles team to investigate Kosovo Williamson 79-82
- 31 Mar. Belanica (Bellanicë): Serbs shell displaced population,



	80,000 forced to flee toward Albania (M)	
Mar.–Apr.	Đakovica (Gjakova): population expelled (M)	
Mar.–Apr.	Kosovska Mitrovica (Mitrovicë): expulsions, mosques destroyed (M)	
Mar.–May	Kaçanik (Kaçanik): over 100 civilians killed, thousands flee (M)	
Mar.–May	Pristina: house to house searches, expulsions (M)	
1 Apr.	Rugova meets with Milošević in Belgrade	Intro 16-17; Trix 237
2 Apr.	Ćerim (Qerim): 50 killed, houses burned (M)	Williamson 88
23 Apr.	NATO bombs RTS broadcast facilities in Belgrade	Dragović-Soso 403
Apr.	700 bodies removed from Kosovo and reburied on military base	Nielsen 344
Apr.	Gnjilane (Gjilan): Serb forces burn homes, expel thousands (M)	
Apr.	Serbian liberals' petition regarding Kosovo conflict	Dragović-Soso 402
7 May	NATO bombs Chinese embassy in Belgrade	
2–3 May	Vučitrn (Vushtrri): 100	

	civilians killed, 20,000 expelled; hundred detained in prison at Smrekovnica (Smrakoncë) and tortured (M)	
22 May	Dubrava Prison in Istok (Istog): prisoners executed (M)	
9 June	Kumanovo Accords (Military Technical Agreement), ending Kosovo conflict	Intro 55; Williamson 91
10 June	SC Res. 1244 authorizes international presence in Kosovo	
10 Dec.	Tuđman dies	Intro 28; Lamont 207
<b>2000</b>		
24 Sept.	FRY presidential elections: Milošević loses vote	Intro 30, 51-52; Greenawalt 384
5 Oct.	Bulldozer Revolution: Milošević removed from power (steps down 6 Oct.)	Intro 30; Greenawalt 384
6 Oct.	Košunica and Chief of General Staff Nebojša Pavković meet with Milošević, reportedly offer guarantees	Pešić 415
13 Oct.	Croatian Parliament issues Declaration on the Homeland War	Lamont 205, 211
23 Dec.	Serbian parliamentary	Bieber 424

elections: former opposition  
wins, SPS reduced

## 2001

- |         |  |                                 |
|---------|--|---------------------------------|
| Jan.    | Pres. Koštunica receives<br>Milošević as head of largest<br>opposition party                                   | Pešić 415                       |
| 31 Mar. | U.S.-imposed deadline for<br>arrest of Milošević (see<br>Milošević and trial timelines<br>for further entries) | Dragović-Soso 393;<br>Shany 450 |
| Nov.    | Attempted coup in Serbia by<br><i>Crvene Beretke</i> elements  | Pešić 417                       |

## 2002

- |           |  |  |
|-----------|--|--|
| Aug.      | SPS nominates Živojinović<br>for presidency over<br>Milošević's objections | Bieber 429                               |
| Late 2002 | <i>Vreme</i> debate in Serbia  | Dragović-Soso 389-<br>408; Pešić 409-418 |

## 2003

- |         |  |                      |
|---------|--|----------------------|
| 25 Feb. | State Union of Serbia and<br>Montenegro declared,<br>replacing FRY | Intro 30; Bieber 434 |
| 12 Mar. | Đinđić assassinated;<br>Operation <i>Sablja</i>                    | Intro 30; Bieber 423 |
| 19 Oct. | Izetbegović dies   |                      |
| Nov.    | HDZ returns to power in<br>Croatia in coalition                    | Intro 28; Bieber 428 |
| 28 Dec. | Milošević heads SPS list in<br>elections for last time; party      | Bieber 424           |

performs poorly

## **2004**

- |            |  |                           |
|------------|--|---------------------------|
| 17–18 Mar. | Riots and attacks on Serbs and minorities in Kosovo, destruction of churches | Intro 29                  |
| 6 Dec.     | Serbian Pres. Boris Tadić apologizes for crimes in Bosnia                    | Intro 33; Kostovicova 251 |

## **2006**

- |        |   |          |
|--------|---|----------|
| 3 June | Montenegro declares independence                      | Intro 30 |
| 5 June | Serbia declares itself legal successor to State Union | Intro 30 |

## **2007**

- |      |  |                           |
|------|--|---------------------------|
| June | Serbian Pres. Tadić apologizes for crimes in Croatia | Intro 33; Kostovicova 251 |
|------|--|---------------------------|

## **2008**

- |         |   |   |
|---------|---|---|
| 17 Feb. | Kosovo issues unilateral declaration independence | Intro 29; Kostovicova 256; Greenawalt 378; Bieber 420 |
| Oct.    | Coalition for RECOM established                   | Kostovicova 252                                       |

## **2010**

- |         |   |                 |
|---------|---|-----------------|
| 31 Mar. | Serbian National Assembly issues formal declaration condemning crimes at Srebrenica | Kostovicova 251 |
| Nov.    | Serbian President Boris   | Kostovicova 251 |



Tadić apologizes for crimes  
in Ovčara

## **2012**

31 May	Tomislav Nikolić elected Serbian President	Bieber 429
2 June	Pres. Nikolić suggests in interview no genocide at Srebrenica	Bieber 429

## **2013**

19 Apr.	Serbia and Kosova reach EU- brokered deal on integration of northern Kosovo into Kosova's political structures
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## **2. International Criminal Law and the ICTY**

<b>DATE</b>	<b>EVENT</b>	<b>CHAPTERS</b>
1868	St. Petersburg Declaration	
1899	Hague Conventions (also 1907), Martens Clause	
28 June 1919	Treaty Versailles provides for criminal trials for Kaiser, German war criminals (and Treaty of Sèvres 1920 for Ottoman Empire)	
1921	Leipzig war crimes trials	
8 Aug. 1945	London Charter of the International Military Tribunal (Nuremberg)	Nielsen 330

Nov. 1945–Oct. 1946	Initial Nuremberg Trial	Intro 36-37, 47; Mégret 129-130; Armatta 289; Nielsen 329-332, 346-348; Bieber 349-350; Shany 444-445
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19 Jan. 1946	Charter of the International Military Tribunal of the Far East (Tokyo)
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May 1946–Nov. 1948	Tokyo Trials convened	Shany 444
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1946–49	German war crimes trials under Allied Control Council Law 10
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9 Dec. 1948	Genocide Convention	Intro 31; Shany 446; Várady 462, 463
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12 Aug. 1949	Geneva Conventions	Intro 35, 36; Shany 446
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8 June 1977	Geneva Conventions Additional Protocols I and II
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10 Dec. 1984	Convention against Torture	Shany 446
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## **1992**

13 July	SC Res. 764 warns that those committing violations of “international humanitarian law” in ex-YU will be individually accountable
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13 Aug.	SC Res. 771 calls for submission of potential evidence of war crimes occurring in the former Yugoslavia
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6 Oct.	SC Res. 780 establishes Commission of Experts	Intro 34; Bassiouni 93
16 Dec.	U.S. Secretary of State Lawrence Eagleburger calls for modern Nuremberg and accuses Milošević in 'naming names' speech.	Bassiouni 93

### **1993**

10 Feb.	Commission of Experts submits preliminary report	Intro 34; Bassiouni 96-98
20 Mar.	Bosnia files genocide suit against FRY at the ICJ	Intro 31
25 May	SC Res. 827 establishes ICTY (following SC Res. 808 in Feb.)	Bassiouni 99; Bieber 350
Oct.	Ramon Escovar Salom appointed first ICTY prosecutor (not active)	Bassiouni 98
13 Nov.	ICTY judges, elected by UN General Assembly, meet for first time	

### **1994**

27 May	Final Report of the Commission of Experts issued	Intro 34-35; Bassiouni 98
Aug.	Richard Goldstone appointed ICTY's first prosecutor	Intro 41; Bassiouni 99
4 Nov.	First indictment, against Dragan Nikolić, for Sušica	Waters 310

	camp	
8 Nov.	SC Res. 955 establishes ICTR (Rwanda votes against)	
<b>1995</b>		
26 April	<i>Tadić</i> begins: ICTY's first case brought to trial	Intro 22, 36, 37, 41; Del Ponte 138; Bachmann 261; Waters 300; Nielsen 339; Greenawalt 379-380
24 July	<i>Karadžić &amp; Mladić</i> : indictment for siege of Sarajevo (M)	Greenawalt 382
14 Nov.	<i>Karadžić &amp; Mladić</i> : indictment for Srebrenica (M)	Intro 41, 70; Anoya 169, 170; Armatta 288-289; Nielsen 347; Greenawalt 382
2 Oct.	<i>Tadić</i> : Interlocutory Appeal: ICTY defines its jurisdiction	Greenawalt 379-380
<b>1996</b>		
29 Nov.	<i>Erdemović</i> : pleads guilty; first ICTY conviction; resentenced in 1998 (M)	
1 Oct.	Louise Arbour replaces Goldstone as Prosecutor	Intro 41
<b>1997</b>		
7 May	<i>Tadić</i> : convicted of 11 counts, acquitted of 9; sentenced 14 July (M)	Nielsen 347



29 June	<i>Dokmanović</i> : commits suicide in ICTY detention center	
19 Dec.	<i>Sikirica et al.</i> , “ <i>Keraterm</i> :” Indictments against three accused dropped (M)	
<b>1998</b>		
5, 8 May	<i>Omarska and Keraterm</i> : Indictments against 14 accused dropped (M)	
17 July	ICC: Rome Statute adopted	Armatta 291
2 Sept.	ICTR: <i>Akeyesu</i> : convicted of rape as genocide and other counts	
16 Oct.	Gen. Augusto Pinochet arrested in London on Spanish warrant	
16 Nov.	<i>Mučić “Čelebići Camp”</i> : three convicted, Zejnil Delalić acquitted (first acquittal at ICTY); new sentencing Oct. 2001	
10 Dec.	<i>Furundžija “Lašva Valley”</i> : convicted, sentence increased July 2000	
15 Dec.	Planned establishment of Outreach Office announced	Intro 41; Trix 229; Armatta 284
<b>1999</b>		
29 Apr.	ICJ: FRY files cases against NATO states for bombing;	

	ICJ declines to issue provisional measures on 2 June	
25 June	<i>Aleksovski</i> “ <i>Lašva Valley</i> ,” convicted, confirmed Mar. 2000	
2 July	Croatia files suit against FRY at ICJ	
15 July	<i>Tadić</i> : appeals ruling confirmed sentence; in Nov., convicted on additional counts; confirmed Jan. 2000 (M)	Nielsen 339
11 Aug.	Carla Del Ponte replaces Arbour as Prosecutor	Intro 41
14 Dec.	<i>Jelisić</i> : convicted for crimes against humanity, acquitted of genocide; confirmed July 2001 (M)	Waters 300, 310; Nielsen 333
<b>2000</b>		
14 Jan.	<i>Kupreškić</i> et al., “ <i>Lašva Valley</i> ,” five convicted, Papić acquitted; three <i>Kupreškić</i> ’s acquitted Oct. 2001	
3 Mar.	<i>Blaškić</i> : convicted, sentenced to 45 years, reduced to nine July 2004	Intro 28
8 June	ICTY publishes NATO Inquiry: no basis to investigate bombing East	Intro 26

Timor: Special Panels of the  
Dili District Court created

**2001**

- 22 Feb. *Kunarac et al., “Foča:”* Intro 36  
three convicted, confirmed  
June 2002
- 26 Feb. *Kordić & Čerkez, “Lašva* Intro 36  
*Valley:”* convicted, Čerkez’s  
sentence reduced Dec. 2004
- 31 July *Todorović, “Bosanski* Dragović-Soso 403  
*Šamac:”* convicted (M)
- 2 Aug. *Krstić: convicted for* Bachmann 261;  
genocide at Srebrenica (M) Hartmann 476
- 2 Nov. *Kvočka et al., “Omarska:”*  
five convicted, confirmed  
Feb. 2005 (M)
- 13 Nov. *Sikirica et al., “Keraterm:”* Waters 310  
three convicted (M)

**2002**

- 16 Jan. SCSL: Sierra Leone and UN Intro 70; Askin 156;  
establish Special Court for Armatta 291; Waters  
Sierra Leone 299
- 15 Mar. *Krnojelac, “Foča:”* Waters 310  
convicted, confirmed Sept.  
2003 (M)
- 1 July ICC: treaty enters into force Armatta 291
- 17 Oct. *Milan Simić, “Bosanski*  
*Šamac:”* convicted (M)
- 29 Nov. *Vasiljević, “Višegrad:”* Hartmann 469

convicted, sentence reduced  
Feb. 2004 (M)

## 2003

*various*

13 indictments issued by  
SCSL (various dates)

Feb. *Šešelj* surrenders to ICTY; Anoya 169, 170  
trial begins in 2007

Sept. Prosecutions for ICTY and  
ICTR separated

27 Feb. *Plavšić*: pleads guilty (M) Bachmann 261;  
Nielsen 338

21 Mar. *Naletilić & Martinović*,  
“*Tuta-Stela*:” convicted,  
confirmed May 2006

6 June ECCC: Cambodia and UN Askin 153; Armatta  
agree to establish tribunal 291  
for Khmer Rouge

31 July *Stakić*, “*Prijedor*:” Waters 310; Nielsen  
convicted (M) 340

Aug. SC Res. calls for completion Intro 45; Boas 106-  
strategy to close ICTY, 112, 119  
ICTR by 2010

17 Oct. *Blagoje Simić* et al.,  
“*Bosanski Šamac*:” three  
convicted, Simić’s sentence  
reduced Nov. 2006 (M)

28 Oct. *Banović*, “*Omarska*:”  
convicted (M)

2 Dec. *Momir Nikolić*,  
“*Srebrenica*:” pleads guilty



	to persecutions count, life sentence reduced Mar. 2006 (M)	
3 Dec.	ICTR: <i>Media</i> trial: three convicted, sentences reduced Nov. 2007	
5 Dec.	<i>Galić, "Sarajevo:"</i> convicted, sentence increased to life Nov. 2006 (M)	Prelec 363
9 Dec.	IST: Coalition Provisional Authority establishes Iraq Special Tribunal	
10 Dec.	<i>Obrenović, "Srebrenica:"</i> pleads guilty to persecutions count (M)	
18 Dec.	<i>Dragan Nikolić, "Sušica:"</i> convicted, reduced Feb. 2005 (M)	
<b>2004</b>		
11 Mar.	<i>Česić, "Brčko:"</i> convicted (M)	
18 Mar.	<i>Miodrag Jokić, "Dubrovnik:"</i> convicted, confirmed Aug. 2005 (M)	
30 Mar.	<i>Deronjić, "Glogova:"</i> pleads guilty (M)	
31 Mar.	<i>Mrđa, "Vlašić Mtn:"</i> convicted (M)	
19 Apr.	<i>Krstić, "Srebrenica:"</i>	Bachmann 261;

	convicted for genocide, overturned Apr. 2004, convicted instead of aiding and abetting genocide (M)	Hartmann 476
23 June	ICC: investigation in Democratic Republic of the Congo opened	
29 June	<i>Babić</i> : pleads guilty, confirmed July 2005 (M)	Del Ponte 137; Askin 151; Lamont 208, 212; Nielsen 336, 338, 340-341; Hartmann 469
29 July	ICC: investigation in Uganda opened	
1 Sept.	<i>Brđanin</i> , “ <i>Krajina</i> :” convicted, sentence reduced Apr. 2007 (M)	Waters 310, 312; Nielsen 340
16 Nov.	<i>Halilović</i> : acquitted, confirmed Oct. 2007	
	<i>Limaj</i> et al.: Haradin Bala convicted, Limaj and Musliu acquitted, confirmed Sept. 2007	
7 Dec.	<i>Bralo</i> , “ <i>Lašva Valley</i> :” convicted, confirmed on appeal Apr. 2007	
15 Dec.	ICJ: rejects FRY claim regarding NATO for lack of jurisdiction	Intro 32
<b>2005</b>		
17 Jan.	<i>Blagojević &amp; Dragan Jokić</i> ,	

	<p><i>“Srebrenica:”</i> convicted, Blagojević’s sentence reduced May 2007 (M)</p>	
25 Jan.	<p>Report of UN Fact-Finding Committee on Darfur Shany 447</p>	
31 Jan.	<p><i>Strugar, “Dubrovnik:”</i> convicted, sentence reduced July 2008 (M)</p>	
6 June	<p>ICC: investigation into Darfur opened</p>	
19 Oct.	<p>IST: Hussein trial begins (second trial begins Aug. 2006)</p>	<p>Intro 72; Mégret 127, 129</p>
<b>2006</b>		
15 Mar.	<p><i>Hadžihasanović &amp; Kubura:</i> convicted, sentences reduced Apr. 2008</p>	
29 Mar.	<p>STL: agreement to establish Special Tribunal for Lebanon</p>	
8 May	<p><i>Rajić, “Stupni Do:”</i> convicted</p>	
15 May	<p><i>Stanišić &amp; Simatović</i> begins (M)</p>	<p>Intro 44; Nielsen 347; Hartmann 470- 474</p>
30 June	<p><i>Orić:</i> convicted, acquitted July 2008</p>	
27 Sept.	<p><i>Krajišnik:</i> convicted, acquitted of genocide,</p>	<p>Anoya 169, 170; Shany 177; Waters</p>

	sentence reduced Mar. 2009 (M)	309; Nielsen 333, 340
5 Nov.	IST: Hussein convicted, executed Dec. 2006	Intro 72; Mégret 127, 129
<b>2007</b>		
4 Apr.	<i>Zelenović</i> , “ <i>Foča</i> .” pleads guilty (M)	
22 May	ICC: investigation into Central African Republic opened	
26 Feb.	ICJ: <i>Bosnian Genocide</i> judgment: Bosnian Serbs committed genocide, Serbia violated obligations under Genocide Convention but did not itself commit genocide	Intro 31, 73; Swimelar 184, 197- 199; Bachmann 274; Armatta 287; Waters 308-310; Shany 442, 451-454; Hartmann 461-462; van der Wilt 487
12 June	<i>Martić</i> : convicted, confirmed Oct. 2008 (M)	Nielsen 338, 340, 341; Prelec 369; Hartmann 469
31 July	ECCC: Comrade Duch indicted	Askin 153
27 Sept.	<i>Mrkšić et al.</i> , “ <i>Vukovar Hospital</i> .” two convicted, Miroslavi Radić acquitted; Šljivčanin’s sentence increased May 2009 (M)	Lamont 204, 206
12 Dec.	<i>Dragomir Milošević</i> , “ <i>Sarajevo</i> .” convicted,	Prelec 363



sentence reduced Nov. 2009  
(M)

## 2008

- 1 Jan. Serge Brammertz replaces Del Ponte as Prosecutor
- 3 April *Haradinaj et al.*: Haradinaj and Idriz Bala acquitted, Brahimaj convicted Krasniqi 220; Trix 229
- 10 July *Boškovski & Tarčulovski*: Boškovski acquitted, Taršulosvki convicted for crimes in Macedonia, confirmed May 2010
- 15 Sept. *Rasim Delić*: convicted

## 2009

- 1 Mar. STL: Lebanon Tribunal begins operations
- 26 Feb. MOS trial, “*Kosovo*:” Milutinović acquitted; Šainović, Ojdanić, Pavković, Sreten Lukić, Lazarević, Stojiljković convicted (M) Intro 44; Trix 244 Meierhenrich 323; Nielsen 343-345; Hartmann 468-470
- 20 July *Lukić & Lukić*, “*Višegrad*:” convicted Trix 232
- 26 Oct. *Karadžić* begins (M); Karadžić boycotts, counsel imposed Nov. 2009 and trial suspended until March 2010 Intro 54; Bassiouni 101, 103-104; Prelec 363; Greenawalt 381, 382

## 2010

- 4 Jan. ICJ: Serbia files countersuit Lamont 208; Várady

	against Croatia	461-462
31 Mar.	ICC: investigation into Kenya opened	
10 June	<i>Popović et al.</i> , “ <i>Srebrenica</i> :” seven convicted of genocide/other crimes (M)	Boas 112, 118; Nielsen 340
12 July	ICC: second warrant of arrest for Al-Bashir, including genocide	Shany 447
21 July	<i>Haradinaj</i> : partial retrial ordered	
26 July	ECCC: Comrade Duch convicted	Askin 153
8 Dec.	<i>Šljivančanin</i> : review judgment reduces sentence to 10 years (M)	Lamont 207, 210
<b>2011</b>		
17 Jan.	STL: four indictments issued	
23 Feb.	<i>Đorđević</i> : convicted, 27 years (M)	Nielsen 344-345
26 Feb.	ICC: SC refers situation in Libya to Prosecutor	
15 Apr.	<i>Gotovina</i> : Generals Gotovina and Markač convicted, Čermak acquitted	Intro 28; Lamont 210-211
27 June	ECCC: second trial begins	Askin 153; Armatta 291

6 Sept.	<i>Perišić</i> : convicted, sentenced to 27 years (M)	Intro 44; Nielsen 341-343; Hartmann 474-480
<b>2012</b>		
14 Mar.	ICC: Lubanga convicted of war crimes for use of child soldiers	Armatta 291
26 Apr.	SCSL: Charles Taylor convicted (sentenced to 50 years in May)	Intro 70; Askin 156; Armatta 291; Shany 447
16 May	<i>Mladić</i> begins (M)	Bassiouni 101, 103-104; Prelec 357, 363; Greenawalt 381, 382
28 June	<i>Karadžić</i> : Rule 98bis decision, acquitted of genocide charge for 1992 (M)	
12 Nov.	<i>Gotovina</i> : On appeal, Gotovina and Markač acquitted	Swimelar 201; Lamont 210-211
22 Nov.	ICC: warrant of arrest for Simone Gbagbo unsealed, for Ivory Coast	
28 Nov.	<i>Haradinaj</i> : On retrial, Haradinaj acquitted	Trix 229
12 Dec.	<i>Tolimir</i> : Gen. Tolimir convicted on genocide charge for Srebrenica (M)	Anoya 169
18 Dec.	ICC: Mathieu Ngudjolo Chui acquitted	Intro 23

## 2013

28 Feb.	<i>Perišić</i> : On appeal, Perišić acquitted (M)	Nielsen 341, Hartmann 468, 470, 476-477
11 Mar.	ICC: charges against Frances Kirimi Muthuara withdrawn, for Kenya. (Co-accused Kenyatta still faces charges)	
22 Mar.	ICC: Bosco Ntaganda voluntarily surrenders to face trial, for Congo	
30 May	<i>Stanišić &amp; Simatović</i> : Stanišić and Simatović acquitted on all charges (M)	
11 July	<i>Karadžić</i> : On appeal, 1992 genocide charge reinstated (M)	
29 Aug.	<i>Šešelj</i> : Judge Harhoff removed from case for apparent bias, after leaked letter criticizing recent acquittals	Armatta 282
30 Aug.	<i>Krajišnik</i> : Krajišnik given early release, receives hero's welcome in RS (M)	
10 Sep.	ICC: <i>Ruto &amp; Sang</i> trial begins; earlier in the month, Kenyan Parliament votes to withdraw from ICC	

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## 3. Slobodan Milošević



DATE	EVENT	CHAPTERS
20 Aug. 1941	Milošević born in Požarevac, Serbia during German occupation	Intro 48
1960	Milošević begins law school in Belgrade; meets Ivan Stambolić	Intro 49
1962	Milošević's father, Svetozar Milošević, commits suicide	Intro 49
1964	Milošević graduates; becomes economic advisor to Mayor of Belgrade	Intro 49
1965	Milošević marries Mirjana Marković	Intro 48
1968	Milošević begins working at Tehnogas	Intro 49
1972	Milošević's mother, Stanislava Resanović Milošević, commits suicide	Intro 49
1973	Milošević appointed chairman of Tehnogas	Intro 49
1978	Milošević becomes director of Beobanka	Intro 49
April 1984	Milošević elected President of Belgrade Party City Committee	Intro 49
May 1986	Milošević elected President of the Serbian Communist Party	Intro 49

## **1987**

24 April Milošević addresses Serbs in Kosovo Polje Intro 49-50

22 Sept. 8th Session of SK Serbia, Intro 50  
fall of Milošević's mentor  
Stambolić

## **1989**

8 May Milošević elected President of Presidency SR Serbia Intro 17, 50, 51-52  
(reelected 5 Dec.)

28 June Vidovdan speech before Intro 50, 59-60  
massive crowds in Kosovo  
Polje

26 Dec. 1990 Milošević elected President of Republic of Serbia Intro 50, 51  
(reelected Dec. 1992)

23 July 1997 Milošević becomes Intro 51, 83  
President of FRY, President  
of VSO, Supreme  
Commander of VJ

27 May 1999 Initial Kosovo Intro 54-55; Del  
indictment made public) Ponte 136;  
Greenawalt 383

5 Oct. 2000 Bulldozer Revolution: Intro 51-52  
following electoral loss,  
Milošević removed from  
power (steps down 6  
October)

## **2001**

1 Apr. Milošević arrested Intro 52; Greenawalt

		384; Pešić 416
28-9 June	Milošević transferred to the ICTY (see trial time line)	Intro 55; Williamson 91; Dragović-Soso 393; Pešić 414, 416-417; Shany 448-451; Várady 460-461

## 2006

11 Mar.	Milošević dies; trial terminated	Intro 52, 71-73
18 Mar.	Commemoration of Milošević in front of the Parliament, Belgrade	Bieber 420

## 4. Pros. v. Milošević

DATE	EVENT	CHAPTERS
<b>1999</b>		
24 May	Initial <i>Kosovo</i> indictment confirmed (made public on 27 May); warrants of arrest issued	Intro 54-55; Del Ponte 136; Greenawalt 383
<b>2001</b>		
22 Jan.	Judge Hunt reissues warrants, after FRY readmitted to UN	
31 Mar.	Milošević arrested following standoff at his villa	Intro 52; Greenawalt 384; Pešić 416
28-29 June	Milošević transferred to ICTY; <i>Kosovo</i> indictment amended (29 June)	Intro 55, Williamson 91; Dragović-Soso 393; Pešić 414, 416-

		417; Shany 448-451; Várady 460-461
3 July	First appearance; Milošević denounces court and refuses to enter plea; chooses to represent himself	Intro 56; Del Ponte 140-141; Askin 153, 155; Anoya 160-161; Shany 174
6 Sept.	<i>Amici Curiae</i> appointed	Intro 57; Del Ponte 146; Anoya 172
8 Oct.	Initial <i>Croatia</i> indictment confirmed (submitted 27 Sept.)	Intro 56; Del Ponte 137
29 Oct.	Second amended <i>Kosovo</i> indictment	Boas 107
22 Nov.	Initial <i>Bosnia</i> indictment confirmed	Intro 56; Del Ponte 137
13 Dec.	Trial Chamber accepts Motion for Joinder of <i>Croatia and Bosnia</i> , but rejects it for <i>Kosovo</i>	Intro 62-63; Boas 111-116; Mégret 121-128; Del Ponte 138; Askin 153-154; Trix 245
<b>2002</b>		
1 Feb.	Appeals Chamber orders all three cases joined, allows Trial Chamber to start with <i>Kosovo</i> phase (which it decides to do on 4 Feb.)	Boas 115-116, 118-119
12 Feb.	<i>Milošević</i> trial begins; massive media attention; large audiences in former Yugoslavia watch in early days	Intro 56-60; Krasniqi 214-215; Trix 232-235; Bachmann 261; Nielsen 330; Dragović-Soso 390



14–18 Feb.	Milošević opening address	Intro 59-60; Del Ponte 146-147; Bieber 421
19 Feb.	<i>Kosovo</i> phase begins; Mahmut Bakalli testifies	Intro 63; Del Ponte 142; Krasniqi 217-218; Surroi 222-223; Trix 230, 235-237, 240, 245; Kostovicova 256
27 Feb.	Milošević's demands for release from custody are rejected	
Mar.	RTS cancels live broadcasts of trial (they continue on B92, YU Info)	Bieber 421
13–14 Mar.	Patrick Ball testifies on statistical analysis of killings in Kosovo	
9–10 Apr.	Prof. Andras Riedlmayer testifies regarding cultural damage in Kosovo	Waters 310
14–15 Apr.	Lord Ashdown testifies on Kosovo, Tuđman-Milošević plan for Bosnia	Trix 240; Bachmann 266
18–19 Apr.	Veton Surroi testifies	Askin 154; Krasniqi 218; Surroi 222; Trix 234 24 Apr. Sadik Januzi, survivor of Izbica massacre, testifies Trix 241, 242-244, 245, 247
3–4 May	Ibrahim Rugova testifies	Trix 230, 237-239;

		Bachmann 266
11–12 June	Amb. William Walker, U.S. official with KVM, testifies	Williamson 78
13–14 June	Gen. Klaus Naumann, NATO committee chair during Kosovo, testifies	Bachmann 273
24 July	Radomir Marković, former SDB chief, testifies for Prosecution but proves hostile	Del Ponte 145
25 July	Milošević physician recommends shorter trial days; Prosecution recommends imposition of counsel	Del Ponte 148; Askin 155-156
11 Sept.	Prosecution concludes <i>Kosovo</i> phase, having called 124 witnesses	Trix 240
1–3 Oct.	Croatian President Stjepan Mesić testifies	Lamont 209
10 Oct.	Chamber orders <i>Amicus</i> Wladimiroff's appointment revoked	Intro 57; Bachmann 273
26 Sept.	Prosecution begins <i>Croatia</i> and <i>Bosnia</i> phases	
8 Nov.	Milošević physician again recommends shorter trial days	Askin 155-156
18 Nov. –19 Dec.	Former RSK leader Milan Babić testifies, as C-061, then in open court	Askin 151; Lamont 208, 212; Nielsen 336

22 Nov.	Amended <i>Bosnia</i> Indictment	Prelec 360
18 Dec.	Oral Ruling against appointment of Counsel	Anoya 162
<b>2003</b>		
6 Feb.	JNA General Aleksandar Vasiljević testifies	Hartmann 469
20 May	Prosecution extended 100 days to compensate for health-related delays	
5 June	Chamber authorizes protective measures for VSO documents	Intro 45, Swimelar 198, 200-201; Lamont 209; Bachmann 274, 285; Shany 451-454; Várady 461-462; Hartmann 481
17 June	Former Yugoslav President Zoran Lilić testifies	Nielsen 343; Bieber 428
17 Sept.	‘September Order’ concerning Defense case	Anoya 164
30 Sept.	Number of trial days reduced due to Milošević’s health	
21 May	Slovenian President Milan Kučan testifies	
31 May	Victim Alija Gusalić testifies concerning sexual violence	
8 July	Prof. Andras Riedlmayer testifies about cultural damage in Bosnia	Waters 310
23–24 July	Historian Audrey Budding	Bieber 350

	presents expert report on Serbian nationalism	
25 Aug.	Dražan Erdemović, Bosnian Serb soldier, testifies about Srebrenica	
12 Sept.	Historian Robert Donia testifies on RS Assembly (and Nov. 2003)	Waters 310
18–20 Nov.	Borisav Jović, former key Milošević aide, testifies	Lamont 207
3–4 Nov.	Lord Owen testifies	Bassiouni 94, 99-100, 104
15 July	Stjepan Kljuić, Croat member of Bosnian Presidency, testifies	
11 Dec.	Registry imposes communication restrictions on Milošević and Šešelj to prevent contact with media during Serbian elections	
15–16 Dec.	Gen. Wesley Clark, NATO commander during Kosovo war, testifies	Intro 64; Williamson 78; Bachmann 266; Waters 310; Prelec 371
<b>2004</b>		
20–1 Jan.	Genocide expert Ton Zwaan testifies	
21–2 Jan.	Hrvoje Šarinić, Tuđman envoy, testifies about meetings with Milošević	Prelec 363-364



Feb.	Judge May steps down, resigns effective 31 May (dies on 1 July)	Intro 71
25 Feb.	Prosecution rests	Intro 67
3 Mar.	<i>Amici</i> file Rule 98bis Motion to Acquit	Waters 302-303
11 Mar.	Communications restrictions on Milošević lifted	
7 June	Lord Bonomy replaces May; Judge Robinson becomes presiding judge	Intro 71; Anoya 165; Meierhenrich 324
16 June	98bis Decision on the Motion to Acquit: all counts preserved, but many specific allegations thrown out	Waters 303-305; Meierhenrich 320, 323-324; Hartmann 473
16 July	Trial Chamber adjourns due to Milošević's ill health; during this period submissions regarding assigned counsel's role are made	
31 Aug.	Defense phase begins	Intro 41-42, 67-71; Mégret 121-128; Armatta 283; Meierhenrich 318; Bieber 430
3 Sept.	Court appoint <i>Amici</i> as defense counsel; self- representation crisis enters new phase: Milošević resists counsel, many witnesses refuse to cooperate	Anoya 168, 170, 172; Shany 177

Mar.	<i>Pro Se</i> Legal Liaison Office provisionally established	Intro 41, 70; Del Ponte 141; Anoya 162-164, 172; Shany 174, 177
1 Nov.	Appeals Chamber retains counsel but declares presumption that Milošević will conduct own defense when fit	Intro 67-70
16 Nov.	Prof. Mihajlo Marković testifies	
<b>2005</b>		
7 Feb.	ICTY President declines Milošević counsel's request to withdraw	Anoya 171
May–June	Obrad Stevanović, senior MUP officer, testifies for several weeks	
13 May	Contempt decision against Milošević witness Kosta Bulatović	
June	Video of <i>Škorpioni</i> killings at Trnovo played at trial and on Serbian television	Intro 66; Askin 156; Swimelar 192, 194; Nielsen 345; Prelec 367; Bieber 432; Hartmann 473
June–July	Gen. Božidar Delić, commander in Kosovo, testifies	
19 Aug.	Vojislav Šešelj, Radical Party leader, testifies	Boas 109; Bieber 353

9 Dec.	Trial Chamber declines Milošević's request to call British PM Tony Blair and German Chancellor Gerhard Schröder as witnesses	
13 Dec.	Trial Chamber declines to sever Kosovo case, refuses Milošević's request for more time	Boas 117-118
20 Dec.	Milošević requests provisional release for treatment, denied Del	Ponte 148-149
<b>2006</b>		
11 Mar.	Milošević dies	Intro 52, 71-73; Swimelar190-191; Bachmann 269; Bieber 433
12 Mar.	Dutch authorities perform preliminary autopsy	Intro 72
14 Mar.	Trial formally terminated	Intro 71-73; Boas 106
16 Mar.	Trial Chamber lifts some protections to allow Dutch investigation	Intro 72
31 Mar.	Judge Parker's report on Milošević's death released	Intro 72
2006–present	Documents occasionally filed under <i>Milošević</i> case number, concerning use of protected materials in other cases	

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# Notes

## A NOTE ON HOW TO READ THIS BOOK

- 1 Tolbert, *ICTY: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF., Summer/Fall 2002, at 7, 8; *see also Pros. v. Milošević* (IT-02-54-T, Trial Tr. 7-8 (12 Feb. 2002) (Opening Statement by Carla Del Ponte: “With the trial of this particular accused, we reach a turning point of this institution. The proceeding upon which the Chamber embarks today is clearly the most important trial to be conducted in the Tribunal to date. Indeed, it may prove to be the most significant trial that this institution will ever undertake.”); Markovic, *In the Interests of Justice?: A Critique of the ICTY Trial Court’s Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947, 947 (2005) (“The Milošević trial was hailed as a momentous event for both the [ICTY] and international justice as a whole.”); Scharf, *Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 916 (2003) (“*Prosecutor v. Slobodan Milosevic* is clearly the trial for which the Ad Hoc Court was created”).
- 2 Cohen, *Milošević Dictatorship: Institutionalizing Power and Ethno-Populism in Serbia*, in BALKAN STRONGMEN 425, 432 (Fischer ed.) (quoting Dušan Janjić, *Od Etniciteta ka Nacionalizmu*, in KULTURE U TRANZICIJI 29 (Prosić-Dvonić ed.)); Graff, Mader & McAllister, *Slobodan Milosevic: Butcher of the Balkans*, TIME, 8 June 1992.
- 3 *See generally* CIGAR & WILLIAMS, INDICTMENT AT THE HAGUE (examining the role of Serbian authorities in the war).
- 4 *See* ORENTLICHER, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY 80 (quoting a pollster: “Because of Milošević’s death, his trial did not have a ‘wow effect.’ He’s dead, and he was not guilty. Had he been found guilty, we’d be able to get rid of this bad stuff and move toward cooperation with the European Union.”).



- 5 See, e.g., Tavernier, *Death of Slobodan Milosevic and the Future of International Criminal Justice*, HAGUE JUSTICE PORTAL (5 Apr. 2006), <http://www.haguejusticeportal.net/eCache/DEF/5/351/TG1Ug.html> (raising questions, in light of the trial's termination, regarding the function of judicial institutions and the expectations of the international community in seeing former dictators brought to justice and historical truths established).
- 6 Cf. Scharf, *Legacy of the Milosevic Trial* 916 (suggesting the trial would “dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans”); Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529 (2008) (noting the politicized qualities of the *Milošević* and *Hussein* trials, but arguing that these are not the norm).

## CHAPTER 1

- 1 See MAZOWER, *THE BALKANS* 3–36; STAVRIANOS, *THE BALKANS SINCE 1453* 1–8; MALCOLM, *BOSNIA* 1–2; OSBORNE, *EAST-CENTRAL EUROPE—A GEOGRAPHICAL INTRODUCTION* 184, 197ff.
- 2 On national identity, see generally Geertz, “Primordial and Civic Ties,” in *NATIONALISM* (Hutchinson & Smith, eds.), at 29–34; BRUBAKER, *ETHNICITY WITHOUT GROUPS* (2004). Nationalist theorists can point to the 10th century *De administrando Imperio*, which mentions Serbs and Croats; this simply begs the question if the groups mentioned are meaningful lineal antecedents of today's national communities. CONSTANTINE VII PORPHYROGENITOS, *DE ADMINISTRANDO IMPERIO*.
- 3 See MALCOLM, *BOSNIA* 1–9; MAZOWER, *THE BALKANS* 39–76. See also ÁGOSTON & MASTERS, *ENCYCLOPEDIA OF THE OTTOMAN EMPIRE* 422–26 (2009) (discussing the formation of national identity).
- 4 MALCOLM, *KOSOVO: A SHORT HISTORY* (2002). Croatian nationalists have also claimed Illyrian origins. Albanians are mentioned in the *Alexiad* from the 12th century. COMNENA, *THE ALEXIAD*, <http://www.fordham.edu/halsall/basis/AnnaComnena-Alexiad.asp>.
- 5 On the ethnic and national communities of the former Yugoslavia, see generally POULTON, *THE BALKANS: MINORITIES AND STATES IN CONFLICT* 1–104.

- 6 On the Bosnian kingdom, see MALCOLM, BOSNIA 13–26; DONIA & FINE, BOSNIA AND HERCEGOVINA: A TRADITION BETRAYED 15–18, 28–34; FINE, EARLY MEDIEVAL BALKANS.
- 7 ÁGOSTON & MASTERS, ENCYCLOPEDIA OF THE OTTOMAN EMPIRE 309–10.
- 8 BELLAMY, FORMATION OF CROATIAN NATIONAL IDENTITY 65–104.
- 9 HUPCHICK, THE BALKANS: FROM CONSTANTINOPLE TO COMMUNISM 200.
- 10 See generally TODOROVA, IMAGINING THE BALKANS 129 (discussing the importation of Herder’s ideas into the region); PROMITZER, HERMANIK & STAUDINGER (HIDDEN) MINORITIES 178. An example is the Croat Yugoslavist Cardinal Strossmayer. See TOMLIJANOVICH, BISKUP JOSIP JURAJ STROSSMAYER 70 ff.
- 11 See PAVLOWITCH, SERBIA, HISTORY OF AN IDEA 26–64. In 1878, Austria-Hungary occupied Bosnia, annexing it in 1908.
- 12 Milošević case, Trial Tr. 50 (12 Feb. 2002) (Prosecution’s opening statement); see also ROUDOMETOF, NATIONALISM 116–18 (discussing the history of the *Načertanije*).
- 13 See Bugge, “‘Shatter Zones’: Creation and Re-Creation of Europe’s East,” in IDEAS OF EUROPE SINCE 1914, 47–68 (Spiering & Wintle, eds.).
- 14 On the formation of Yugoslavia generally, and in particular the ethno-political component, see BANAC, NATIONAL QUESTION IN YUGOSLAVIA; see also TOAL & DAHLMAN, BOSNIA REMADE 46–76 (discussing wartime rhetoric during the 1990s concerning the naturalness, unnaturalness, artificiality, or impossibility of Yugoslavia).
- 15 See PROMITZER, HERMANIK & STAUDINGER, (HIDDEN) MINORITIES.
- 16 See generally JANOS, EAST CENTRAL EUROPE IN THE MODERN WORLD 280; WOODWARD, BALKAN TRAGEDY.
- 17 See, e.g., Djordjevic, “Yugoslav Phenomenon,” in COLUMBIA HISTORY OF EASTERN EUROPE IN THE TWENTIETH CENTURY (Held, ed.) (discussing historical contradictions in Yugoslavism).
- 18 RELIGION AND THE WAR IN BOSNIA (Paul Mojzes ed.); SELLS, BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA 14; DONIA & FINE, BOSNIA AND HERCEGOVINA 9 (noting Bosnians’ lack of deep religiosity “after fifty years of a secular and very secularizing Yugoslav state”).
- 19 See, e.g., DONIA & FINE, BOSNIA AND HERCEGOVINA 6–12. Marko, “United in Diversity”?: Problems of State- and Nation-Building, 30 VT. L. REV. 503 (2005–06).

- 20 See MALCOLM, BOSNIA 199–200; ROUDOMETOF, NATIONALISM, GLOBALIZATION, AND ORTHODOXY 122–23.
- 21 On intermarriage patterns, see Botev, *Seeing Past the Barricades*, 11 ANTHROPOLOGY EAST EUR. REV. 29 (1993).
- 22 See generally GREENBERG, LANGUAGE AND IDENTITY IN THE BALKANS. See also KORDIĆ, JEZIK I NACIONALIZAM; Luk, “Linguistic Aspect,” in YUGOSLAVIA, THE FORMER AND FUTURE (Akhavan & Howse, eds.).
- 23 Young, “Croatian Language Policy,” in NATIONALISM IN A GLOBAL ERA (Young ed.); see, e.g., PAVLOWITCH, SERBIA 174 (discussing language politics in Croatia in the 1960s and 1970s).
- 24 Judah & Binyon, *Warring Factions*, TIMES, 28 Aug. 1992 (quoting Prime Minister John Major’s remarks at the London Conference of 26–27 Aug. 1992).
- 25 MAZOWER, THE BALKANS 147 (continuing “Indeed the Ottoman empire was better able than most to accommodate a variety of languages and religions.”); but see STAVRIANOS, BALKANS 105 (noting that although the sultan might confirm the rights of the Church, that was “no guarantee against Moslem fanaticism or arbitrary actions by provincial officials.”). See also BARKEY, EMPIRE OF DIFFERENCES.
- 26 Wachtel & Bennett, “Dissolution of Yugoslavia,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 15.
- 27 See MAZOWER, THE BALKANS 38ff. (describing the absence of modern nationalist sensibilities among peasant populations in the Balkans into the 20th century); see generally DONIA & FINE, BOSNIA.
- 28 MAHMUTĆEHAIĆ, BOSNIA THE GOOD.
- 29 See, e.g., JUDAH, KOSOVO: WAR AND REVENGE 1–32 (reviewing the history of Serb-Albanian relations in Kosovo); Williams, *Earned Sovereignty*, 31 DENV. J. INT’L L. & POL’Y 387, 390 (2003) (“The history of the territory of Kosovo is marked by near perpetual competition for sovereign control between Kosovar Albanians and Serbs. Throughout the history of the competition, sovereignty has ebbed and flowed from Kosovar Albanians to the Serbs and back again.”); Kinzer, *Ethnic Conflict Threatening in Yet Another Region of Yugoslavia*, N.Y. TIMES, 9 Nov. 1992 (“For the Serbs who rule them, they [Kosovar Albanians] feel only resentment and hostility.”).



- 30 See, e.g., *Kosovo's Independence*, INT'L CRISIS GROUP (Feb. 2009); Bilefsky, *Kosovo Declares Independence from Serbia*, N.Y. TIMES, 18 Feb. 2008; Momčilo Pavlović, *Kosovo under Autonomy, 1974–1990*, in CONFRONTING THE YUGOSLAV CONTROVERSIES 49–51.
- 31 On Royal Yugoslavia generally, see LAMPE, YUGOSLAVIA AS HISTORY; DJOKIĆ, ELUSIVE COMPROMISE; Djordjevic, “Yugoslav Phenomenon,” 314–23.
- 32 ROTHSCHILD, EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS 210–37.
- 33 See DJOKIĆ, ELUSIVE COMPROMISE 171ff.
- 34 See *Pros. v. Kordić*, IT-95-14/2, Trial Tr. 137-8 (25 June 1997) (discussing the *Sporazum* that created the Banovina of Croatia, a departure from the policy of creating banovinas along geographical, rather than ethnic lines).
- 35 See Djordjevic, *Yugoslav Phenomenon* 323–27.
- 36 On the Chetniks, including their frequent collaboration with the occupying forces, see TOMASEVICH, THE CHETNIKS; on the resistance and collaboration, see TOMASEVICH, OCCUPATION AND COLLABORATION (2001).
- 37 See Dulić, “Ethnic Violence in Occupied Yugoslavia,” in NEW PERSPECTIVES ON YUGOSLAVIA 82–99 (Djokic & Ker-Lindsay, eds.). On violence during the war generally, see PAVLOWITCH, HITLER'S NEW DISORDER.
- 38 See, e.g., BIONDICH, THE BALKANS: REVOLUTION, WAR, AND POLITICAL VIOLENCE; DULIĆ, UTOPIAS OF NATION: LOCAL MASS KILLING IN BOSNIA.
- 39 See, e.g., DRAKULIĆ, THEY WOULD NEVER HURT A FLY: WAR CRIMINALS ON TRIAL 8–12; CHUCK SUDETIC, BLOOD AND VENGEANCE (discussing the wartime legacy's effect on the conflict around Srebrenica in the 1990s). On the influences of memory on the conflicts in the 1990s, see Höpken, *War, Memory, and Education*, 13 EAST EUROPEAN POLITICS & SOCIETIES 190 (1999); Robert M. Hayden, *Recounting the Dead: The Rediscovery and Redefinition of Wartime Massacres in Late- and Post-Communist Yugoslavia*, in MEMORY, HISTORY, AND OPPOSITION UNDER STATE SOCIALISM 167 (Rubie S. Watson, ed., 1994); Paul Lenvai, *Yugoslavia without Yugoslavs: The Roots of the Crisis*, 67 INT'L AFF. 251 (1991).



- 40 Cf. Wachtel & Bennett, "Dissolution of Yugoslavia," in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 15–18 (discussing the tensions in this ideology and slogan).
- 41 See generally BURG, *CONFLICT AND COHESION IN SOCIALITY YUGOSLAVIA*; RUSINOW, *YUGOSLAV EXPERIMENT*.
- 42 PAVLOWITCH, *SERBIA* 170–72. On Ranković and Kosovo, see MALCOLM, *KOSOVO: A SHORT HISTORY* 198, 205; LeBOR, *MILOSEVIC: A BIOGRAPHY* 32–34.
- 43 See WOODWARD, *BALKAN TRAGEDY* 25. But see also WOODWARD, *SOCIALIST UNEMPLOYMENT*. On the Yugoslav economy generally, see LAMPE, *YUGOSLAVIA AS HISTORY*.
- 44 See SINGLETON, *TWENTIETH-CENTURY YUGOSLAVIA* 171–72 (discussing the critical role of Western aid in the postwar industrial development of Yugoslavia) and 126–29, 143–44 (discussing the development of self-management and the impressive performance of the Yugoslav economy in the 1950s); LAMPE, *YUGOSLAVIA AS HISTORY*.
- 45 See SINGLETON, *TWENTIETH-CENTURY* 179–81 (discussing remittances from Yugoslav *Gastarbeiters*); SINGLETON, *SHORT HISTORY OF THE YUGOSLAV PEOPLES* 242–44 (discussing loans made to Yugoslavia by the IMF and other Western banks in the wake of 1965 market reforms); GLAURDIĆ, *HOOR OF EUROPE* 13 ("Political leaders installed in the wake of the 1971–1972 purges had simply been using borrowed sources and increased consumption to buy popular legitimacy that they did not have.").
- 46 See SINGLETON, *TWENTIETH-CENTURY* 274–79.  
 Устав Социјалистичке Федеративне Републике Југославије (1974)  
 [Constitution] 21 Feb. 1974 (Yugoslavia),  
[http://sr.wikisource.org/wiki/Устав\\_Социјалистичке\\_Федеративне\\_Републике\\_Југославије\\_\(1974\).](http://sr.wikisource.org/wiki/Устав_Социјалистичке_Федеративне_Републике_Југославије_(1974).)
- 47 On the constitutional structure and systems of protections, see WOODWARD, *BALKAN TRAGEDY* 29–38, 41–45.
- 48 See Andelman, *Yugoslavia: The Delicate Balance*, 58 *FOR. AFF.* 835, 840, 849–51 (1980). On Tito, see PAVLOWITCH, *TITO: A REASSESSMENT*.
- 49 WOODWARD, *BALKAN TRAGEDY* 41. See also GLAURDIĆ, *HOOR OF EUROPE* 11ff. On these centrifugal tendencies, see Burg, *Elite Conflict*, 38 *SOVIET STUDIES* 170–93 (1986).

- 50 See Andelman, *Yugoslavia* 849–51 (discussing, just prior to Tito’s death, the problems of succession and the risks to Yugoslavia); Burg, *Elite Conflict*.
- 51 See ALLCOCK, *EXPLAINING YUGOSLAVIA* 426 (2000); see generally DEJAN JOVIĆ, *A STATE THAT WITHERED AWAY*.
- 52 See, e.g., Wachtel & Bennett, “Dissolution of Yugoslavia,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 13, 18ff.
- 53 See *Milošević case* (80), Trial Tr. 16 (12 Feb. 2002) (Prosecutor’s opening statement).
- 54 Const. SFRY, Art. 321 (Belgrade 1974). Representatives of the JNA regularly sat in meetings of the Presidency as nonvoting members.
- 55 See WOODWARD, *BALKAN TRAGEDY* 74.
- 56 See WOODWARD, *BALKAN TRAGEDY* 129.
- 57 See WOODWARD, *BALKAN TRAGEDY* 106ff.
- 58 See, e.g., PAVLOWITCH, *SERBIA* 185–88. On Serb–Albanian relations, see COHEN, *SERPENT IN THE BOSOM: RISE AND FALL OF SLOBODAN MILOŠEVIĆ*, Ch. 1.
- 59 Pavlović, “Kosovo under Autonomy, 1974–1990,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 66–67, 75 (federal intervention in Kosovo “raised the expectations of Kosovo Serbs that the authorities would fully address their concerns. Soon, however, many from the community felt that the new policy did not begin to address all of their concerns, and emigration continued” and, at 75, noting the important role played by nonelite actors in the disintegration of Yugoslavia “[d]ue to the gradual relaxation of repressive policies and practices” in a context of “growing expectations and the relaxation of repression centered on [Kosovo Serbs and other groups]”); Janjić, with Lalaj and Pula, “Kosovo under the Milošević Regime,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 275–77 (discussing nationalist orientation of religious and cultural elites and members of the Serbian Communist Party). On mobilization of Kosovo’s Serbs, see NEBOJŠA VLADISAVLJEVIĆ, *SERBIA’S ANTIBUREAUCRATIC REVOLUTION* (2008).
- 60 See *6 More Yugoslavs Sentenced*, N.Y. TIMES, 30 July 1981.
- 61 “Memorandum of the Serbian Academy of Sciences (SANU),” in *FROM STALINISM TO PLURALISM*, at 277 (Stokes ed., Rusinow trans.). Audrey Helfant Budding analyzed the Memorandum in her expert report,

presented during the *Milošević* trial. *Milošević case*, Expert Report of Audrey Helfant Budding, “Serbian Nationalism in the Twentieth Century” 53–58 (29 May 2002).

- 62 See Danopoulos & Chopani, “Albanian Nationalism,” in *CRISES IN THE BALKANS* 176 (Danopoulos & Chopani eds.).
- 63 On Kosovar opposition, see Janjić et al., “Kosovo under the Milošević Regime,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 279–85, 286–88.
- 64 On the interaction of minority concerns and internal borders, see Stokes, “Independence and the Fate of Minorities,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 98–100 (noting, at 98, Serbia’s rejection of a federalization plan and that Milošević, “[i]nvoking the principles that had been the norms in socialist Yugoslavia, ... argued that such an agreement would turn Serbs living in non-Serbian republics from a ‘nation’ into a ‘national minority.’”).
- 65 Gow, “Serbia and the Politics of the Yugoslav Armies,” in *POLITICAL ARMIES* 301ff, (Koonings & Kruijt eds.); Bieber, “Role of the Yugoslav People’s Army in the Dissolution of Yugoslavia,” in *STATE COLLAPSE* 301–30 (Cohen & Dragović-Soso eds.); GLAUDIĆ, *HOPE OF EUROPE* 25–29 (discussing the JNA’s pressure campaign against Slovenia in 1988, which Milošević supported).
- 66 See, e.g., LINZ & STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION*; Zakaria, *Rise of Illiberal Democracy*, 76 *FOREIGN AFFAIRS* 22 (1997).
- 67 RAMET, *SERBIA* 34; see also JOVIĆ, *A STATE THAT WITHERED AWAY* 197, 312–31.
- 68 RAMET, *SERBIA* 34.
- 69 See, e.g., *Martić*, IT-95-11-T, Judgment (12 June 2007) ¶ 130.
- 70 JUDAH, *SERBIA* 165.
- 71 LUCARELLI, *EUROPE AND THE BREAKUP OF YUGOSLAVIA* 16–17; Jović, “Slovenian-Croatian Confederal Proposal,” in *STATE COLLAPSE* 249ff (discussing the strategic considerations around the declarations of independence).
- 72 On the conflicts, see *BALKAN BATTLEFIELDS* (U.S. Central Intelligence Agency, Office of Russian and European Analysis, 2002); GLENNY, *FALL OF YUGOSLAVIA*; SILBER & LITTLE, *YUGOSLAVIA: DEATH*

OF A NATION. On the diplomatic context, *see* GLAUDIĆ, HOUR OF EUROPE. On the demographic effects, *see* CONFLICT IN NUMBERS (Ewa Tabeau, ed., 2009), <http://www.scribd.com/doc/30793049/Conflict-in-Numbers-Edited-by-Ewa-Tabeau> (giving statistics for various aspects of all the conflicts).

- 73 LEBOR, MILOŠEVIĆ: A BIOGRAPHY 135ff.
- 74 *Milošević case* (142), Trial Tr. 29127-325 (18, 19 Nov. 2003) (testimony of Jović on the politics of Yugoslavia).
- 75 *See* Sudetic, *Croats Concede Danube Town's Loss*, N.Y. TIMES, 18 Nov. 1991 (discussing the fall of Vukovar); *see also* MARKOVIĆ, YUGOSLAV CRISIS AND THE WORLD 22–33 (discussing the political aspects of the war); Mesić, *The First Phase, 1990–1992*, in WAR IN CROATIA AND BOSNIA—HERZEGOVINA 14–41 (MAGAŠ & ŽANIĆ, eds., 2001) (giving a Croatian perspective of the war). There was renewed fighting in 1993 that altered the front lines in Croatia's favor, and also led to several indictments at the ICTY.
- 76 S.C.Res. 743, U.N. Doc. S/RES/743 (21 Feb. 1992).
- 77 *See, e.g.*, Divjak, "First Phase, 1992–1993: Struggle for Survival and Genesis of the Army of Bosnia-Herzegovina," in WAR IN CROATIA AND BOSNIA 154 (Magaš & Žanić, eds.) (discussing arming of Bosnian Serbs by JNA); GOW, SERBIAN PROJECT 121–29.
- 78 HUM. RTS. WATCH, WEIGHING THE EVIDENCE 8 (2006), <http://www.unhcr.org/refworld/docid/45a4dc282.html>.
- 79 Badinter Arbitration Committee, Opinion No. 4, reprinted in Annex 3: Opinions No. 4–10 of the Arbitration Commission of the International Conference on Yugoslavia, 4 EUR. J. INT'L L. 74–75 (1993). On this and the Commission's other opinions, *see* CAPLAN, EUROPE AND THE RECOGNITION OF NEW STATES IN YUGOSLAVIA; TERRETT, DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION; RADAN, BREAKUP OF YUGOSLAVIA AND INTERNATIONAL LAW 204–43.
- 80 MALCOLM, BOSNIA 231.
- 81 *See* Divjak, "First Phase, 1992–1993," in WAR IN CROATIA AND BOSNIA 152–77 (Magaš & Žanić, eds.).
- 82 *See, e.g.*, *Pros. v. Blaškić*, IT-95-14; *Pros. v. Kordić*, IT-95-14/2-T.
- 83 *See* HUM. RTS. WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA (1992) (on crimes early in war).



- 84 See generally MALCOLM, BOSNIA 234ff.; see also *Airlift to Sarajevo Resumes Aid*, ORLANDO SENTINEL, 4 Mar. 1995.
- 85 See generally Ingrao, “Safe Areas,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 201ff.
- 86 See Petrovic, *Ethnic Cleansing*, 5 EJIL 1 (1994); Calic, “Ethnic Cleansing and War Crimes,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 118–19 (describing a range of contexts in which ethnic homogenization of territory can be a purposive or incidental component of military policy).
- 87 On the varying methods deployed to ethnically cleanse areas, and the relationship of regional variations to an overall policy—a matter of considerable consequence in a leadership case—see Petrovic, *Ethnic Cleansing* (generally arguing for the unity of ethnic cleansing policies in the Balkan wars). For an example of the importance of local context, see SUDETIC, BLOOD AND VENGEANCE. On the role of policy in ICL, especially in relation to crimes against humanity, see Mettraux, “Definition of Crimes against Humanity,” in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142ff (Sadat ed.).
- 88 *Pros. v. Lukić*, IT-98-32/1, Second Amended Indictment ¶ 28 (27 Feb. 2006).
- 89 See *Pros. v. Kordić* (2), Judgment ¶ 10 (26 Feb. 2001) (describing massacre at Ahmići).
- 90 See András J. Riedlmayer, “Destruction of Cultural Heritage in Bosnia-Herzegovina” (2002), <http://hague.bard.edu/reports/BosHeritageReport-AR.pdf> (report prepared on behalf of ICTY Prosecution discussing destruction of Muslim and Catholic built infrastructure).
- 91 See, e.g., *Pros. v. Banović*, IT-02-65/1-S (concerning crimes at Keraterm). *Pros. v. Jelisić* (1) IT-95-10, Judgment (14 Dec. 14, 1999) (concerning crimes at Luka).
- 92 See, e.g., Popov, *Traumatology of the Party State*, in ROAD TO WAR IN SERBIA 81–105 (Popov, ed.) (discussing collective memories of trauma as a motive for revenge among Serbs); Vujović, *An Uneasy View of the City*, in ROAD TO WAR IN SERBIA 123–45 (Popov, ed.) (ascribing Serb intolerance of diversity to a traditional suspicion of cities).

- 93 See generally Klemenčić, “International Community and the FRY/Belligerents, 1998–1997,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 153ff; GLAUDIĆ, *Hour of Europe* 236–38, 249–50, 256–57, 282, 285–97 (on Western involvement to the outbreak of the Bosnian war).
- 94 ARMATTA, *Twilight of Impunity* 266 (2010).
- 95 See Kinzer, *Milosevic Stiffens in Talks with U.S. Envoy*, N.Y. TIMES, 3 June 1995.
- 96 *Pros. v. Karadžić & Mladić* (2), Indictment (24 July 1995); *Pros. v. Karadžić & Mladić* (1), Indictment (14 Nov. 1995).
- 97 See MALCOLM, BOSNIA 268; General Framework Agreement for Peace in Bosnia and Herzegovina, 14 Dec. 1995, [http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380) [Dayton Accords]. Formally, Bosnia is not a federal or confederal state—the idea of federalism is problematic in Bosnian political discourse—but in practice it is one of the leading examples of the style.
- 98 See S.C. Res. 1037, U.N. Doc S/RES/1037 (15 Jan. 1996) (establishing UNTAES).
- 99 See SIMMS, *Unfinest Hour: Britain and the Destruction of Bosnia*, On the Tribunal, see Chapter 2.
- 100 See generally JUDAH, *Kosovo: What Everyone Needs to Know*; VICKERS, *Between Serb and Albanian*; NOEL MALCOLM, *Kosovo: A Short History*; GOW, “War in Kosovo, 1998–1999,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 303ff.
- 101 See Humanitarian Law Center, “Human Losses during the NATO bombings” HlcIndexOut: 019-3232-2 (23 Mar. 2012); *Flashback to Kosovo’s War*, BBC, 10 July 2006.
- 102 HUM. RTS. WATCH, *Under Orders: War Crimes in Kosovo*, <http://www.hrw.org/legacy/reports/2001/kosovo/undword-03.htm>.
- 103 Steele, *Serb Killings “Exaggerated” by West*, GUARDIAN, 17 Aug. 2000 (“William Cohen, the US defence secretary, announced that 100,000 Kosovo Albanian men of military age were missing after being taken from columns of families being deported to Albania and Macedonia. ‘They may have been murdered,’ he said”). See also *Flashback to Kosovo’s War*, BBC, 10 July 2006 (discussing the pattern of ethnic cleansing against ethnic Albanians).

- 104 HUM. RTS. WATCH, New Figures on Civilian Deaths in Kosovo War, 8 Feb. 2000, <http://www.hrw.org/news/2000/02/07/new-figures-civilian-deaths-kosovo-war>; Humanitarian Law Center, “Human Losses during the NATO bombings,” (23 Mar. 2012) (breaking down death tolls by region and ethnicity). Civilian losses included both Serbs and Albanians.
- 105 See, e.g., *Pros. v. Milošević*’ (37), Trial Tr. 890ff. (25 Feb. 2002).
- 106 *Pros. v. Milošević, Milutinović, Šainović, Ojdanić, & Stojiljković*, Indictment (22 May 1999).
- 107 Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999, <http://www.nato.int/kosovo/docu/a990609a.htm> [Kumanovo Agreement, June 1999].
- 108 See Waters, *Unexploded Bomb*, 35 N.Y.U. J. INT’L L. & POL. 1015 (2003).
- 109 See, e.g., *Pros. v. Limaj, Bala, Musliu & Murtezi* (1), Indictment (24 Jan. 2003); *Pros. v. Haradinaj, Balaj & Brahimaj* (3), Indictment (4 Mar. 2005).
- 110 See, e.g., SOKALSKI, AN OUNCE OF PREVENTION: MACEDONIA AND THE UN.
- 111 See, e.g., *Pros. v. Boškoski & Tarčulovski*, Judgement (Appeals) (19 May 2010).
- 112 See HUM. RTS. WATCH, BROKEN PROMISES (2003), <http://www.hrw.org/en/reports/2003/09/02/broken-promises> (discussing how 300,000–350,000 Serbs had left Croatia, but only 100,000–110,000 had returned).
- 113 See *Pros. v. Gotovina*, Indictment (21 May 2001).
- 114 See, e.g., Vesna Peric Zimonjic, *Anger on Streets as “National Hero” Generals are Jailed*, INDEPENDENT, 18 Apr. 2011, <http://www.independent.co.uk/news/world/europe/anger-on-streets-as-national-hero-generals-are-jailed-for-war-crimes-2269254.html>.
- 115 Tabeau & Bijak, *War-Related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina*, 21 EUR. J. POPULATION 187 (2005); Tabeau, Żółtkowski, Bijak & Hetland, “Ethnic Composition, Internally Displaced Persons and Refugees” (expert report prepared by

- Demographic Unit, Prosecution, ICTY, 4 Apr. 2003), in *CONFLICT IN NUMBERS: CASUALTIES OF THE 1990S WARS* (Tabeau ed., 2009), <http://www.scribd.com/doc/30793049/Conflict-in-Numbers-Edited-by-Ewa-Tabeau> (giving statistics for various aspects of all the conflicts).
- 116 Dayton Accords.
- 117 *See generally* TOAL & DAHLMAN, *BOSNIA REMADE* (providing an extensive examination of return patterns).
- 118 *See, e.g.*, ŠARCEVIC, BOSNIAN INSTITUTE, *ETHNIC SEGREGATION AS A DESIRABLE CONSTITUTIONAL POSITION?*, [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2528](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2528) (arguing that Dayton violates international law); Knudsen & Nielsen, “International Trusteeship and Democratic Peacebuilding,” in *EUROPEAN UNION AND PEACEBUILDING* (Blockmans, Wouters & Ruys, eds.).
- 119 *See, e.g.*, Basic, *Bosnian Society on the Path to Justice, Truth and Reconciliation*, in *PEACEBUILDING AND CIVIL SOCIETY IN BOSNIA-HERZEGOVINA* 357, 367 (noting that in Bosnian textbooks “there is a sharp and profound disagreement with regard to [the war] that both reflects and cements former ethnic divisions. ... [T]hree explanatory models are being used: in textbooks for Serb pupils there was a civil war, in history books for Bosniaks the same event is described as aggression, whereas in the textbooks for Croat pupils it was a defensive war”).
- 120 S. C. Res. 1244, S/RES/1244 (10 June 1999). *See also* KING & MASON, *PEACE AT ANY PRICE* (discussing the international administration of Kosovo).
- 121 *Unfriendly Fire*, *ECONOMIST*, 15 Oct. 2003 (discussing “standards before status”); *Kosovo Rioters Burn Serb Churches*, *BBC*, 18 Mar. 2004.
- 122 *See, e.g.*, *Kosovo’s Independence*, INT’L CRISIS GROUP (Feb. 2009); Bilefsky, *Kosovo Declared Independence from Serbia*, *N.Y. TIMES*, 18 Feb. 2008.
- 123 *See* Milošević case (130), Trial Tr. 11162 (8 Oct. 2002) (noting how Đukanović turned against Milošević’s policies).
- 124 *See* Castle, *Mladic Arrest Opens Door*, *N.Y. TIMES*, 26 May 2011.



- 125 ICJ, *Bosnian Genocide*, Judgment (Feb. 2007). A separate case, filed by Croatia, is currently being argued on the merits. ICJ, *Croatian Genocide* (Croatia v. Yugoslavia) (2 July 1999), <http://www.icj-cij.org/docket/files/118/7125.pdf>.
- 126 In international law, reparations are not necessarily monetary.
- 127 See Simons, *Serbia's Darkest Pages Hidden from Genocide Court*, N.Y. TIMES, 8 Apr. 2007.
- 128 Some were dismissed immediately in June 1999; others were dismissed later, on the grounds that the FRY had not been a member of the UN capable of bringing a claim at the time. See BEKKER & BORGES, WORLD COURT REJECTS YUGOSLAV REQUESTS, AM. SOC'Y OF INT'L LAW (1999); *ICJ Dismisses Belgrade Genocide Claims*, EURACTIV, 29 Jan. 2010, <http://www.euractiv.com/enlargement/icj-dismisses-belgrade-genocide-claims-nato-states/article-133540>. On the intervention and its effects on international law, see, for example, Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 A.J.I.L. 824 (1999); GLENNON, LIMITS OF LAW.
- 129 G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (8 Oct. 2008).
- 130 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports, 22 July 2010; see Waters, *Misplaced Boldness*, \_\_ DUKE. J. COMP. & INT'L L. \_\_ (forthcoming).
- 131 Capacity Building, ICTY.ORG, <http://www.icty.org/sid/240>. See, e.g., *Status of Transferred Cases*, ICTY. ORG, <http://icty.org/sid/8934> Press Release, Court of Bosnia and Herzegovina (24 Dec. 2010), <http://www.sudbih.gov.ba/index.php?id=1895&jezik=e> ("Since January 2005 to this day the Court of BiH, Section I for War Crimes, has pronounced 58 final and legally binding Verdicts in war crimes cases, involving 78 individuals. Of the said number 62 individuals were convicted and 16 were acquitted of the charges. The convicted persons were sentenced to a total of 921 years of imprisonment. Moreover, the Court has also pronounced 15 non-final Verdicts for 31 individuals. Twenty-two individuals were sentenced to 432 years and three months of imprisonment under these non-final Verdicts. In comparison, from the moment the Hague Tribunal was established in 1993 it has finalized 54 cases of war crimes involving 84 individuals. During the 17 years of its work it has pronounced sentencing judgments totaling to

924 years of imprisonment and one life imprisonment. The Court of BiH has sentenced 7 individuals to a total of 121 years of imprisonment just for the crimes committed at *Korićanske stijene*. Since its establishment the ICTY has convicted two men for these crimes, while there were no trials before entity courts. Therefore, questioning the work of the Court of BiH, or even its existence, is extremely inappropriate and arbitrary.”)

- 132 See IWPR, INTRODUCTION TO BALKAN WAR CRIMES COURTS, <http://iwpr.net/programme/international-justice-icty/introduction-balkan-war-crimes-courts>, (discussing the War Crimes Chamber of the Court of Bosnia and Herzegovina; UNMIK Regulation 2000/64, providing for a court in Kosovo; and the War Crimes Panel within the Belgrade District Court).
- 133 See, e.g., Int’l Human Rights Law Inst. et al., Chicago Principles on Post-Conflict Justice (2007), [http://www.concernedhistorians.org/content\\_files/file/to/213.pdf](http://www.concernedhistorians.org/content_files/file/to/213.pdf).
- 134 See Stromseth, *Pursuing Accountability for Atrocities*, 38 GEO. J. INT’L L. 251, 251–56 (2007).
- 135 See U.N. Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 38, U.N. Doc. S/2004/616 (23 Aug. 2004) (describing objectives as “bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace”).
- 136 See, e.g., Press Release, Office of the High Representative, Bas-Backer: Reconciliation Indispensable for Post-War Recovery (27 Oct. 2006), [http://www.ohr.int/print/?content\\_id=38368](http://www.ohr.int/print/?content_id=38368) (“Justice, Truth, Peace and Forgiveness are four elements in a reconciliation process that is indispensable for post-war recovery”); *Kosovo, Serbia Advised to Seek Compromise*, EURACTIV, 30 Aug. 2010 (discussing linkage between European integration and reconciliation), <http://www.euractiv.com/enlargement/kosovo-serbia-advised-seek-compromise-news-497250>.
- 137 See, e.g., Goldstone, *Ethnic Reconciliation Needs the Help of a Truth Commission*, N.Y. TIMES, 24 Oct. 1998 (discussing the need for a truth

- and reconciliation commission to ensure lasting peace); Boraine, *Toward Reconciliation*, N.Y. TIMES, 18 Dec. 2002 (discussing how Biljana Plavšić's acceptance of responsibility for war time actions will further reconciliation); *but see* Brunwasser, *Bosniaks and Croats, Divided in Class and at Play*, N.Y. TIMES, 1 July 2011 (discussing failure of reconciliation among ethnic groups in Bosnia).
- 138 See Mackey, *Serbia's President Apologizes*, N.Y. TIMES, 4 Nov. 2010 (noting Tadić's apology to Croats). Mackey, *Two Apologies, No Trial over Srebrenica*, N.Y. TIMES, 31 Mar. 2010 (discussing the Serbian parliament's condemnation of the deaths at Srebrenica). *See also* Dragović-Soso, *Apologizing for Srebrenica*, 28 EAST EUROPEAN POL. 163 (2012). Tadić's successor, Tomislav Nikolić, has denied that acts at Srebrenica constituted genocide, though he describes them as "grave war crimes." *Srebrenica "Not Genocide"*, BBC NEWS, 1 June 2012.
- 139 Wood, *Bosnian Serbs Apologize for Srebrenica Massacre*, N.Y. TIMES, 11 Nov. 2004 (noting Paddy Ashdown's role in Republika Srpska's apology); *see also* Office of the High Representative, *A Distasteful Attempt to Question Genocide*. OHR 20/4/2010, [http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=44835](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=44835) (criticizing the RS government statements that cast doubt on the Srebrenica massacre).
- 140 *See, e.g.*, SUBOTIĆ, *HIJACKED JUSTICE* 83–121 (discussing Croatia's coming to terms with its wartime actions). Lamont makes a similar point concerning Croatia.
- 141 *See* Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the period from 1991–2001 (RECOM), <http://www.zarekom.org/> [Initiative for RECOM].

## CHAPTER 2

- 1 *See* Cohen, *U.N. in Bosnia*, N.Y. TIMES, 25 Apr. 25, 1995 (claiming that the court was a substitute for military action).
- 2 U.N. Security Council, *Final Report of UN Commission Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 (27 May 1994).



- 3 The report does strongly suggest they are involved. U.N. S.C. Rep. of Commission of Experts, S/1994/674, ¶ 133, 141 (27 May 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/200/60/PDF/N9420060.pdf?OpenElement>.
- 4 See WILLIAMS & SCHARF, PEACE WITH JUSTICE? 95–96 (2002).
- 5 S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993), <http://daccess-ods.un.org/TMP/7550703.28712463.html>. U.N. Charter Art. 39 (“[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall ... decide what measures shall be taken ... to maintain or restore international peace and security.”) and 41 (“[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions”).
- 6 See Humphrey, *International Intervention, Justice and National Reconciliation*, 2 J. HUM. RTS. 495, 496 (Dec. 2003) (“The fact that the life span of the ICTY is explicitly linked to the restoration of peace reflects this wider role of international prosecutions.... They are part of the institutionalizing strategies, along with peace negotiations, democratic elections and truth commissions to promote national reconstruction after mass atrocity.”). See also IWPR, THE HAGUE TRIBUNAL AND BALKAN RECONCILIATION (2010) (“[I]t has been widely hoped that the ICTY had a role to play beyond simply dispensing criminal justice.... over the years, an expectation has persisted that the ICTY’s work would or should help to reconcile the peoples of the Balkans with their violent recent history, even if only as a by-product of its central, specifically judicial aims”), <http://iwpr.net/report-news/hague-tribunal-and-balkan-reconciliation>; DIANE ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED. at 39–42 (“The word ‘reconciliation’ is not used in the Security Council resolution establishing the ICTY, nor is it included in the goals of the Tribunal on its own Web site. Even so, many have assumed that the Security Council’s determination that creating the ICTY would contribute to peace includes the notion of reconciliation—a view that has at times been reflected in ICTY judgments and reports.”) (footnotes omitted). See also Press Release, the ICTY, The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina



(17 May 2001), <http://www.icty.org/sid/7985> (referring to the Tribunal's "mission of reconciliation").

- 7 See, e.g., CRYER, FRIMAN, ROBINSON & WILMSHURST, INTRODUCTION TO CRIMINAL LAW AND PROCEDURE 9–11 (discussing the relationship and reliance of ICL on human rights and humanitarian law); SIKKINK, JUSTICE CASCADE; Hirschl, *The New Constitutionalism and the Judicialization*, 75 FORDHAM L. REV. 721, 722 (2006) (describing the turn to legal discourse for questions of public policy and traditionally political issues). SHANY, COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (describing a "greater commitment to the rule of law in international relations"); Teitel & Howse, *Cross-Judging*, 41 N.Y.U. J. INT'L L. & POL. 959, 961 (2009) ("the dynamic relationship between tribunalization and shifts in normative substance has led some tribunals to become deeply entangled with politics"). On the focus on individuals in ICL, see TEITEL, HUMANITY'S LAW 73ff.
- 8 Stat. ICTY, Art. 1, 25 May 1993, 32 I.L.M. 1192.
- 9 Stat. ICTY, Art. 2-5.
- 10 U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 29, U.N. Doc. S/25704 (3 May 1993).
- 11 See Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape*, 99 A.J.I.L. 778 (2005).
- 12 See, e.g., Waters, *Unexploded Bomb*, 35 N.Y.U. J. INT'L L. & POL. 1015, 1077 (2003) (discussing claims about the Tribunal's progressive jurisprudence on sexual violence).
- 13 ORENTLICHER, SHRINKING THE SPACE.
- 14 *Achievements*, ICTY.ORG, <http://www.icty.org/sid/324>; *ICTY Global Legacy—2011 Conference*, ICTY, <http://www.icty.org/sid/10405>; *Pros. v. Kunarac*, Judgment 320 (22 Feb. 2001) ("Rape, a CRIME AGAINST HUMANITY punishable under Article 5 (g) of the Statute of the Tribunal."); *Id.* at 308 ("Enslavement, a CRIME AGAINST HUMANITY punishable under Article 5 (c) of the Statute of the Tribunal."); *Pros. v. Kordić* (2), Judgment ¶ 364 (26 Feb. 2001) (majuscule original).
- 15 Stat. ICTY, Art. 7(1) ("1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation

or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”)

- 16 Stat. ICTY, Art. 7(3) (“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”)
- 17 *See Pros. v. Nikolić* (2), Sentencing Judgment (2 Dec. 2003) (“[B]y holding individuals responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political Organisation) would not be held responsible for such crimes by members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent.”).
- 18 HUM. RTS. WATCH, *WEIGHING THE EVIDENCE* 3.
- 19 On the ICTY’s command responsibility jurisprudence generally, see Slidregt, “Command Responsibility at the ICTY,” *in* *LEGACY OF THE ICTY* 377ff (Swart et al., eds.).
- 20 On JCE generally, see Danner & Martinez, *Guilty Associations* 93 CAL. L. REV. 75 (2005).
- 21 The term used by these tribunals was “common plan or conspiracy.” *See* International Military Tribunal (Nuremberg), Judgment and Sentences (1 Oct. 1946), *reprinted in* 41 A.J.I.L. 172, 186 (1947). Conspiracy is analytically separate from the JCE doctrine developed at the ICTY, though many observers have noted their common origins and close analogies. *See, e.g.,* Danner & Martinez, *Guilty Associations*.
- 22 *Pros. v. Tadić* (2), Appeals Judgment ¶¶ 189–90 (15 July 1999).
- 23 *See Pros. v. Tadić* (2), Appeals Judgment ¶¶ 195–204 (15 July 1999); Danner & Martinez, *Guilty Associations* 102–10.
- 24 *See* Haffajee, Note, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR*, 29 HARV. J. L. & GENDER 201, 214 (2006).
- 25 Stat. ICTY, Art. 7(1).
- 26 *Pros. v. Tadić*, IT-94-1-A, Appeal Judgment ¶¶ 189–90 (15 July 1999) (note using the actual term “joint criminal enterprise,” but describing

the concept in the same terms that have been later used under the name “JCE”).

- 27 On the structure of Chambers, see generally ORGANISATIONAL CHART, ICTY, <http://www.icty.org/sid/326>.
- 28 See ICTY, Web site, *Global Spread of International Criminal Justice* (updated May 2009), <http://www.icty.org/sid/10058>.
- 29 See ORENTLICHER, SHRINKING THE SPACE 65–68 (discussing critiques of the ICTY’s outreach efforts before and after establishment of the Outreach Program in 1999, in the context of Serbia); ICTY, Outreach Programme (Web site) <http://www.icty.org/sections/Outreach>.
- 30 See Tolbert, *ICTY and Defense Counsel*, 37 NEW ENG. L. REV. 975 (2003).
- 31 See generally Combs, “Regulation of Defence Counsel: An Evolution towards Restriction and Legitimacy,” in LEGACY OF THE ICTY 296ff (Swart et al., eds).
- 32 See ICTY, IT/125 REV. 3, CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE TRIBUNAL (as amended on 22 July 2009), [http://www.icty.org/x/file/Legal%20Library/Defence/defence\\_code\\_of\\_conduct\\_july2009\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf).
- 33 See *Pros. v. Šešelj* (5), Decision on Appeal against Trial Chamber’s Decision on Assignment of Counsel (8 Dec. 2006) (granting Accused’s request to proceed pro se).
- 34 See Arbour, *Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 3 HOFSTRA L. & POL’Y SYMP. 37, 46 (1999) (“the Tribunals are completely dominated by the Anglo-American common law system”); Fairlie, *Marriage of Common and Continental Law*, 4 INT’L CRIM. L. REV. 243, 268–70 (2004) (the Statute of the ICTY adopted an adversarial structure).
- 35 ICTY, R. P. & EVID., IT/32, R.62 (11 Feb. 1994); Clark, *Plea Bargaining at the ICTY*, 20 EUR. J. INT’L L. 415 (2009); King & Meernik, “Assessing the Impact of the ICTY,” in LEGACY OF THE ICTY 27–28 (Swart et al., eds.); Eser, “Procedural Structure and Features of International Criminal Justice,” in *id.* 129–31.
- 36 See, e.g., Simons, *Milosevic Lessons*, N.Y. TIMES, Apr. 2, 2006 (noting that the Milošević trial had amassed over 1.2 million pages).

- 37 ICTY, R. P. & EVID., IT/32/Rev.17, R.92*bis* (as amended on 7 Dec. 1999).
- 38 Member State Cooperation, ICTY, <http://www.icty.org/sid/137>.
- 39 *See, e.g., Tadic Trial Becomes a History Lesson*, USA TODAY, 9 May 1996 (discussing testimony by Dr. James Gow concerning the breakup of Yugoslavia).
- 40 Note by the Secretary General, Report of the ICTY, A/57/370-S/2002/985, Annex 1 (4 Sept. 2002).
- 41 *See Ford, A Social Psychology Model*, 45 VANDERB. J. TRANSN. L. 405, 412–18 (2012).
- 42 S.C. Res. 1503, ICTY and ICTR, U.D. Doc. S/RES/1503 (2003); S.C. Res. 1534, ICTY and ICTR, U.N. Doc. S/RES/1534 (2004).
- 43 *See* Letter dated May 23, 2011 [*sic*] from the President of the ICTY to the President of the Security Council, S/2012/354, 23 May 2012, Enclosures VII and VIII (giving the anticipated trial and appeals schedules).
- 44 *See* ICTY, Mechanism for International Criminal Tribunals, <http://www.icty.org/sid/10874>. The ICTY and ICTR are to be replaced by the International Mechanism that will handle remaining business, such as appeals, requests for early release, and the lifting of confidentiality, or any other matters that might arise
- 45 *See Barria & Roper, How Effective Are International Criminal Tribunals?*, 9 INT’L J. HUM. RTS. 349, 349 (2005) (noting that problems with apprehending suspects has reduced ICL’s deterrent effect).
- 46 *See* PESKIN, VIRTUAL TRIALS.
- 47 *See* Borger, *Hunt for the Former Yugoslavia’s War Criminals*, GUARDIAN, 3 Aug. 2011.
- 48 *See* Borger, *Hunt for the Former Yugoslavia’s War Criminals*.
- 49 Simons, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, N.Y. TIMES, 15 June 2013.
- 50 *Achievements*, ICTY.ORG, <http://www.icty.org/sid/324>.
- 51 *Achievements*, ICTY.ORG, <http://www.icty.org/sid/324> (specifically section entitled “Developing International Law”).
- 52 ORENTLICHER, SHRINKING THE SPACE.
- 53 NETTELFIELD, COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA (2010).



- 54 See, e.g., Clark, “Impact Question,” in *LEGACY OF THE ICTY* 55ff; KOSTIĆ, *AMBIVALENT PEACE* 320 (Swart et al., eds.) (reporting data from 2005 survey in Bosnia that found the following definitions of the war by ethnicity: “Civil war”—3.7 percent of Bosniaks, 16.7 percent of Croats, and 83.6 percent of Serbs; “Aggression”—95.1 percent of Bosniaks, 73.2 percent of Croats, and 9 percent of Serbs); Dan Saxon, *Exporting Justice: Perceptions of the ICTY*, 4 J. HUM. RTS. 559, 563–67 (2005) (describing different perceptions of the fairness of the ICTY between Bosniaks, Croats, and Serbs). See also Ford, *A Social Psychology Model* 412–18 (arguing, at 418, that “perceptions of legitimacy appear to be determined largely by how the court attributed responsibility for the atrocities that were committed during the conflict.” and, at 419ff on social psychological evidence, that the ICTY’s legitimacy is predominantly driven by the levels of identification between the affected populations and the sides in the conflict on the one hand, and the targets of prosecution on the other). But see Ivković & Hagan, *Politics of Punishment and the Siege of Sarajevo*, 40 LAW & SOC’Y REV. 369, 393 (2006) (noting that in surveys conducted in 2000 and 2003 in Bosnia “perceptions of the ICTY’s fairness were little influenced by the respondents’ ethnicity”). On the Tribunal’s own view, see, for example, ICTY, REPORT OF THE PRESIDENT ON THE CONFERENCE ASSESSING THE LEGACY OF THE ICTY 1–2 (27 Apr. 2010) (“the communities [of the former Yugoslavia] have not yet reconciled and this is not something that could be achieved by the Tribunal alone.”); *The Hague Tribunal and Balkan Reconciliation*, INST. FOR WAR & PEACE REPORTING (15 Feb. 2010) (“if the ICTY is able to play any role in fostering reconciliation in the Balkans, it can only do so within the context of an intricate web of interlinked factors which could take decades to unravel. At the heart of the problem lies an intense resistance by many in the region to the reality that their own ethnic kin committed atrocities”). But see NETTELFIELD, *COURTING DEMOCRACY* 3 (examining the ICTY’s positive impact on Bosnia’s democratic transition).
- 55 See DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW*.
- 56 ORENTLICHER, *SHRINKING THE SPACE* 29; PESKIN, *VIRTUAL TRIALS* 244.
- 57 Karstedt, “Nuremberg Tribunal and German Society,” in *LEGACY OF NUREMBERG* (Blumenthal & McCormack eds.).

## CHAPTER 3

- 1 See KERR, ICTY: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY (“in December 1992 [US Secretary of State] Lawrence Eagleburger made what has become known as his ‘naming names speech’ in which he announced that the United States had identified ten suspected war criminals who should be prosecuted, including Milošević”). See also PATH TO THE HAGUE 55–57 (Cassese ed.) (text of Eagleburger’s speech). See Bassiouni at 93.
- 2 SCHARF & SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 9–12 (2002).
- 3 See LEBOR, MILOSEVIC: A BIOGRAPHY 29–30.
- 4 DJUKIĆ & DUBINSKY, MILOŠEVIĆ AND MARKOVIĆ: A LUST FOR POWER 15 (quoting General Nikola Ljubičić). Ljubičić had been a minister of defense.
- 5 Jackson Diehl, *Ambitious Yugoslav Tries to Fill Void Left by Tito*, WASH. POST, 9 Oct. 1988, A1, cited in GLAURDIĆ, HOUR OF EUROPE 18.
- 6 DJUKIĆ & DUBINSKY, MILOŠEVIĆ AND MARKOVIĆ 11 (suggesting that Milošević and his wife may have orchestrated the principal incident that transformed him into a Serb national hero).
- 7 SILBER & LITTLE, YUGOSLAVIA: DEATH OF A NATION 37; MILOŠEVIĆ, GODINE RASPLETA 140–46 (giving the text of Milošević’s speeches that day); DEATH OF YUGOSLAVA—PART ONE (“Enter Nationalism”), <http://video.google.com/videoplay?docid=-6980751398015745064> (with video of the original utterance, at approximately minute 13:09).
- 8 On Milošević’s control of patronage and media, see Wachtel & Bennett, “Dissolution of Yugoslavia,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 29–30.
- 9 LEBOR, MILOŠEVIĆ: A BIOGRAPHY 88–99.
- 10 LEBOR, MILOSEVIC: A BIOGRAPHY 122. *Vidovdan*, St. Vitus’ Day, is a significant date in Serbian nationalist iconography, in significant part because of the battle, though it was also the date Serbian nationalists assassinated Archduke Franz Ferdinand in 1914. Djordjevic, “Role of St. Vitus’ Day,” in KOSOVO (Dorich & Jenkins eds.), <http://www.srpska-mreza.com/bookstore/kosovo/kosovo18.htm>.
- 11 SELL, SLOBODAN MILOSEVIC AND THE DESTRUCTION OF YUGOSLAVIA 88–89 (noting, at 88, that the middle of the speech sounded “as if it was written by his wife”—that is, by an orthodox communist); see also

Milosevich's [*sic*] Speech at Kosovo Field in 1989, <http://www.icdsm.com/milosevic/kosovo.htm> ("Speech by Slobodan Milosevich, delivered to an estimated 1 million people at the central celebration marking the 600th anniversary of the Battle of Kosovo, held at Gazimestan on 28 June, 1989. Compiled by the National Technical Information Service of the US Department of Commerce.") On Milošević's rhetoric during the mid-1980s, *see* JOVIĆ, A STATE THAT WITHERED AWAY 253–57.

- 12 *See* SELL, SLOBODAN MILOŠEVIĆ 88–89. *Cf.* GLAURDIĆ, HOUR OF EUROPE 11 ("From the perspective of Yugoslavia's post-Tito political development, Milošević's rise to power and his campaign for control over the federation were a form of break with the past. In many ways, however, they also represented a continuation (albeit extreme) of Yugoslav political competition among the country's national/republican elites.").
- 13 LEBOR, MILOSEVIC: A BIOGRAPHY 79. An example of this ambiguity was Milošević's initial response to events in Kosovo, following his meetings there in 1987. He arranged for a session of the Central Committee to be convened to demand improved implementation of existing policies but also to criticize previous leaders in Kosovo in a way that "implicitly questioned the policy of federal leadership from the late 1960s and Kosovo's highly autonomous status[.]" Pavlović, "Kosovo under Autonomy," *in* CONFRONTING THE YUGOSLAV CONTROVERSIES 72. *See also* Vladislavljević, *Grassroots Groups, Milošević or Dissident Intellectuals?*, 32 NATIONALITIES PAPERS 781–96 (2004).
- 14 *See* Stokes, "Independence and the Fate of Minorities," *in* CONFRONTING THE YUGOSLAV CONTROVERSIES 95 (describing Milošević's political skills and lack of ideological convictions beyond maintaining his own power, and calling him "[s]urely the most complex of the main players in the Wars of Yugoslav Secession").
- 15 *See, e.g.,* Kaufman, "International" Theory of Inter-Ethnic War, 22 REV. INT'L STUD. 149, 159–62 (Apr. 1996) (describing the conflicts as elite-led violence with Milošević as a central player) Bozic-Roberson, *Words before the War: Milosevic's Use of Mass Media*, 38 EAST EUROPEAN Q. 395 (2004) (analyzing Milošević's role through his rhetoric). *See also* GAGNON, MYTH OF ETHNIC WAR.



- 16 See WILLIAMS & CIGAR, A PRIMA FACIE CASE FOR THE INDICTMENT OF MILOSEVIC.
- 17 BETHLEHEM & WELLER, YUGOSLAV CRISIS IN INTERNATIONAL LAW xxxi.
- 18 Centar za proučavanje alternativa, Prevaricating Politicians, July 2002 at 14. The organization Strategic Marketing has similar data for 2000 and 2001. Strateški marketing, Javno mnjenje Srbije, Nov. 2001.
- 19 SCHARF & SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 35–38.
- 20 IRI opinion poll data cited in Jack Snyder & Leslie Vinjamuri, *Trials and Errors*, 28 INT’L SECURITY 21–22 (Winter 2003/4).
- 21 Judge Kevin Parker, Report to the President: Death of Slobodan Milošević (30 May 2006) [PARKER REPORT].

## CHAPTER 4

- 1 Milošević had several case numbers; this is the one used throughout the actual trial. There are some excellent books on the trial, two by authors of chapters in this volume. Judith Armatta’s *Twilight of Impunity* (2010) provides a largely chronological account of the trial, whereas Gideon Boas’s *The Milošević Trial* (2007) develops a synthetic critique of the trial from the perspective of a participant and expert in ICL.
- 2 Acting Secretary of State Lawrence Eagleburger, Intervention of the London Conference on the Former Yugoslavia, 3 DEP’T ST. DISPATCH, 13 Aug. 1992, at 673; CIGAR & WILLIAMS, CASE FOR INDICTMENT.
- 3 Press Release, Statement by Justice Louise Arbour, Prosecutor ICTY, ICTY.ORG (27 May 1999), <http://www.icty.org/sid/7764> (“I have been stressing for several months now our commitment to functioning as a real time law enforcement operation.”).
- 4 *Pros. v. Milošević, Milutinović, Šainovic, Ojdanić, & Stojiljković*, IT-99-37, Initial Indictment (Kosovo) (22 May 1999).
- 5 Kumanovo Agreement, June 1999, <http://www.nato.int/kosovo/docu/a990609a.htm>.
- 6 Sarah Birch, *2000 Elections in Yugoslavia*, 21 ELECTORAL STUD. 499 (2002).
- 7 LEBOR, MILOSEVIC: A BIOGRAPHY 347–50 (copy of terms of surrender Annex 1).



- 8 *Pros. v. Milošević* (34), IT-99-37-I, Trial Tr. 2 (3 July 2001).
- 9 *Pros. v. Milošević* (20), IT-99-37-PT, Decision on Preliminary Motions (8 Nov. 2001); *see also Pros. v. Tadić* (5), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995).
- 10 BOAS, MILOSEVIC TRIAL 1. *Pros. v. Milošević* (23), IT-99-37-PT, Second Amended Indictment (Kosovo) (16 Oct. 2001); *Milošević case* (2), Amended Indictment (Bosnia and Herzegovina) (22 Nov. 2002); *Pros. v. Milošević* (31), Second Amended Indictment (Croatia) (28 July 2004).
- 11 BOAS, MILOŠEVIĆ TRIAL 129.
- 12 *See, e.g., Pros. v. Milošević* (2), Initial Indictment (Croatia) (27 Sept. 2001), [http://www.icty.org/x/cases/slobodan\\_milosevic/ind/en/ind\\_cro010927.pdf](http://www.icty.org/x/cases/slobodan_milosevic/ind/en/ind_cro010927.pdf) (mentioning Milošević's responsibility under articles 7(1) at ¶¶ 5–28 and under article 7(3) at ¶¶ 29–33).
- 13 *Cf. Milošević case* (83), Trial Tr. 8 (12 Feb. 2002) (Prosecution Opinion Statement, “This trial will make history, and we would do well to approach our task in the light of history”).
- 14 U.N. Secretary-General, Report of the ICTY, ¶110, U.N. Doc. A/58/297-S/2003/829 (20 Aug. 2003).
- 15 *Pros. v. Milošević* (22), IT-99-37-PT, Order Inviting Designation of *Amicus Curiae* 2 (30 Aug. 2001).
- 16 *Pros. v. Milošević* (22), IT-99-37-PT, Order Inviting Designation of *Amicus Curiae* 2 (30 Aug. 2001); *see also* SCHABAS, UN INTERNATIONAL CRIMINAL TRIBUNALS 621 (2006) (discussing the role of the *Amici* in *Milošević*).
- 17 “No state or organization is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes....” *Milošević case*, Trial Tr. 4 (12 Feb. 2002).
- 18 *Milošević case* (82), Trial Tr. 8-9 (12 Feb. 2002) (citing Baron d’Estournelles de Constant).
- 19 *Milošević case* (85), Trial Tr. 10-11 (12 Feb. 2002).
- 20 *See* WILSON, WRITING HISTORY 86.
- 21 *Milošević case* (88), Trial Tr. 16 (12 Feb. 2002).
- 22 *Milošević case* (88), Trial Tr. 16 (12 Feb. 2002).
- 23 *Milošević case* (89), Trial Tr. 19.3 (12 Feb. 2002) (notation of tape).

- 24 *Milošević case* (81)-(85), Trial Tr. (12 Feb. 2002).
- 25 Milosevic Gains Sympathy in Serbia via TV, DPA, 26 Feb. 2002.
- 26 *Milošević case* (94), Trial Tr. 246–47, 284 (14 Feb. 2002).
- 27 *See generally* BOAS, MILOŠEVIĆ TRIAL, ch. 2.
- 28 HUM. RTS. WATCH, WEIGHING THE EVIDENCE 75.
- 29 BOAS, MILOŠEVIĆ TRIAL 80–92 (discussing the content and scope of the indictments).
- 30 *See* ICTY, R. P. & EVID., IT/32, R.49 (11 Feb. 1994) (“[t]wo or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.”).
- 31 *Pros. v. Milosevic* (10), Decision on Prosecution’s Motion for Joinder (13 Dec. 2001).
- 32 HUM. RTS. WATCH, WEIGHING THE EVIDENCE.
- 33 *See* Armatta at 281–82; ARMATTA, TWILIGHT OF IMPUNITY.
- 34 *Milošević Case* (143), Trial Tr. 30369-413 (15 Dec. 2003).
- 35 *See* ARMATTA, TWILIGHT OF IMPUNITY; LEBOR, MILOSEVIC: A BIOGRAPHY.
- 36 Williams, *Prosecutor Is Fired Up for Trial of Milosevic*, L.A. TIMES, 3 July 2001 (quoting Del Ponte’s concern for witnesses); IWPR, *Prosecutor Reveals Role of Paramilitaries* (14 Jan. 2003), <http://iwpr.net/report-news/prosecutor-reveals-role-paramilitaries-milosevic-exposes-witness-dan>.
- 37 ICTY, R. P. & EVID., IT/32/Rev.19, 92bis (13 Dec. 2000); Kai Ambos, International Criminal Procedure: Adversarial, Inquisitorial or Mixed, 3 INT’L CRIM. L. REV. 1, 27 (2003); Bassin, Note, *Dead Men Tell No Tales*, 81 N.Y.U. L. REV. 1766 (2006).
- 38 IWPR, *Milosevic Dominates Trial*, 14 May 2002, <http://iwpr.net/report-news/milosevic-dominates-trial-time-saving-procedure-allows-accused-cross>; IWPR, *Milosevic’s Cross Examination*, 7 Feb. 2003, <http://iwpr.net/report-news/milosevics-cross-examination-not-vukovar-testimony> (discussing one witness’ giving additional information on the JNA’s role in the Ovčara massacre).
- 39 *Cf.* Glaurdić, *Inside the Serbian War Machine*, 23 EAST EUR. POL. & SOC. 86 (2009).
- 40 Comiteau, *Prosecution Rests*, TIME, 12 Sept. 2002 (quoting Milošević’s advisor Zdenko Tomanović that the Prosecution had failed to meet its

burden); Wallace, *Prosecution in Milosevic Trial Rests Case Early*, L.A. TIMES, 26 Feb. 2004 (discussing interview with Del Ponte in which she acknowledged a lack of direct evidence for the genocide charge).

- 41 *Milošević case* (60), Prosecution Notification of the Completion of its Case and Motion for the Admission of Evidence in Written Form (25 Feb. 2004); Groome, *Adjudicating Genocide*, 31 FORDHAM INT'L L.J. 911, 963 (2008). Sullivan, *Muted End to Milosevic Prosecution*, INST. ON WAR & PEACE REP., 9 Nov. 2005, <http://iwpr.net/report-news/muted-end-milosevic-prosecution> (NB: date is in error—2004). The Prosecution expected to have one more summation, at the trial's end.
- 42 *Milošević case* (16), Decision on Motion for Judgement of Acquittal (16 June 2004).
- 43 BOAS, MILOŠEVIĆ TRIAL; ARMATTA, TWILIGHT OF IMPUNITY.
- 44 MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 68.
- 45 *Milošević case* (72), Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004).
- 46 *Pros. v. Milošević* (22), IT-99-37-PT, Order Inviting Designation of *Amicus Curiae* (30 Aug. 2001); *Pros. v. Milošević* (36) Trial Tr. 15–8 (30 Aug. 2001).
- 47 *Milošević case* (78), Office of the Prosecutor on Future Conduct of Case in Light of the State of the Accused's Health ¶ 18 (8 Nov. 2002).
- 48 Stat. ICTY, Art. 21.
- 49 Castle, *Milosevic Ordered to Have Health Checks*, INDEPENDENT, 7 July 2004.
- 50 See, e.g., ARMATTA, TWILIGHT OF IMPUNITY 145–46, 190, 236–39 (discussing provision of fraudulent documents to the Prosecution by Milošević's supporters, which Milošević later produced at trial as exculpatory).
- 51 *Milošević case* (10), Decision in Relation to Severance, Extension of Time and Rest (12 Dec. 2005).
- 52 Cf. Turner, *Defense Perspectives*, 48 VA. J. INT'L L. 529 (2008).
- 53 *Milošević case* (72), Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004).

- 54 *Milošević case* (14), Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 Nov. 2004). *See also* DARCY & POWDERLY, JUDICIAL CREATIVITY 260–62.
- 55 WALD, TYRANTS ON TRIAL; Jennings, *Self-Representation under Scrutiny*, IWPR.NET, 6 Nov 2009, <http://iwpr.net/report-news/self-representation-under-scrutiny>. *Cf.* BOAS, MILOŠEVIĆ TRIAL 12 (“the combination of pathological self-belief, megalomania, and cowardice is a factor the renders the trial of these people extremely difficult.”).
- 56 BOAS, MILOŠEVIĆ TRIAL 12.
- 57 Hotis, *A “Fair and Expeditious” Trial*, 6 CHI. J. INT’L L. 775 (2005–2006); Boas & McCormack, *Learning the Lessons of the Milošević Trial*, 9 Y.B. INT’L HUMANITARIAN L. 65 (2006).
- 58 Scharf, *Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915 (2002–03) (criticizing Milosevic’s control over the proceedings).
- 59 *See generally* PARKER REPORT.
- 60 PARKER REPORT; ARMATTA, TWILIGHT OF IMPUNITY.
- 61 PARKER REPORT ¶¶ 14–5. From late 2004 to November 2005, there were no adjournments due to health reasons. Thereafter delays again became numerous and protracted.
- 62 *Milosevic Trial Resumes*, RADIO FREE EUROPE, 23 Jan. 2006, <http://www.rferl.org/content/article/1064971.html>; *Milosevic’s Russia Trip Opposed*, MOSCOW TIMES, 23 Dec. 2005.
- 63 *Milošević case* (13), Decision on Assigned Counsel Request for Provisional Release (23 Feb. 2006); *Milošević case* (12), Decision on Assigned Counsel Motion for Expedited Appeal against the Trial Chamber’s “Decision on Assigned Counsel Request for Provisional Release” (17 Mar. 2006) (dismissing motion as moot).
- 64 Post & Panis, *Tyranny on Trial*, 38 CORNELL INT’L L.J. 823 (2005).
- 65 PARKER REPORT.
- 66 PARKER REPORT ¶¶ 67–79 (discussing, among other things, tests showing the presence of rifampicin, a drug that would have counteracted some of the drugs Milošević was prescribed); *id.* ¶82 (reporting discovery of unprescribed antihypertensive drugs, originating in Serbia, in Milošević’s cell); *id.* 103–11.
- 67 PARKER REPORT ¶ 112ff.



- 68 Del Ponte, Press Conference of the ICTY Prosecutor (12 Mar. 2006), *in* 1 WAR CRIMES PROS. WATCH (20 Mar. 2006).
- 69 PARKER REPORT; Text of Slobodan Milosevic's Letter to the Russian Ministry of Foreign Affairs; Ian Traynor, *Heart Failure Blamed*, THE GUARDIAN, 12 Mar. 2006.
- 70 See PARKER REPORT ¶ 95, 101–02.
- 71 See, e.g., North, *Murder of Slobodan Milosevic*, GLOBAL RESEARCH.CA, 1 June 2006; Steinberg, *LaRouche: Milosevic Murder to Trigger East-West Conflict*, EIRFEATURE 24 Mar. 2006.
- 72 See, e.g., *Milošević case* (158), Vlastimir Djordjevic's motion for access to transcripts, exhibits, and documents in the case Prosecutor v. Milošević, case no. IT-02-54 (29 Oct. 2007); *Milošević case* (38), Ivan Cermak's and Mladen Markac's joint motion for access to confidential testimony and documents in Prosecutor v. Slobodan Milosevic case (9 Jan. 2007).
- 73 HUM. RTS. WATCH, WEIGHING THE EVIDENCE 1.

## CHAPTER 5

- 1 *Horror at Kosovo Massacre*, BBC ONLINE NETWORK, 17 Jan. 1999.
- 2 KIM, KOSOVO CONFLICT CHRONOLOGY, CRS REP. 11.
- 3 KIM, KOSOVO CONFLICT CHRONOLOGY 12.
- 4 See, e.g., Solana, Secretary General, Press Conference, NATO (13 Oct. 1998) (transcript, <http://www.nato.int/docu/speech/1998/s981013b.htm>) (announcing the issuance of an activation order for NATO forces following Holbrooke's negotiations); Cohen, *NATO Nears Final Order to Approve Kosovo Strike*, N.Y. TIMES, 11 Oct. 1998.
- 5 S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993).
- 6 YOUNGS, OAKES & BOWERS, INT'L AFFAIRS & DEFENCE, KOSOVO, RESEARCH PAPER 99/34, AT 17 (U.K.H.C.).
- 7 YOUNGS ET AL., INT'L AFFAIRS & DEFENCE: KOSOVO 18.
- 8 JUDAH, KOSOVO: WAR AND REVENGE 237–48.
- 9 Atlas, *Milosevic: Arsonist and Fireman*, SUN SENTINEL, 6 Apr. 1999.
- 10 CONST. SFRY, Art. 135-6.
- 11 CONST. SFRY, Art. 313, 316.

- 12 CONST. SFRY, Art. 321.
- 13 CONST. SFRY, Art. 77 (7) and 135 (“In wartime and peacetime, the Army of Yugoslavia shall be under the command of the President of the Republic, pursuant to decisions by the Supreme Defense Council. The Supreme Defense Council shall be made up of the President of the Republic and presidents of the member republics. The President of the Republic shall preside over the Supreme Defense Council.”).
- 14 JUDAH, *THE SERBS: HISTORY, MYTH, AND THE DESTRUCTION OF YUGOSLAVIA* 230.
- 15 JUDAH, *KOSOVO: WAR AND REVENGE* 33.
- 16 *Kosovo Indictment* ¶ 57.
- 17 *Serbs Allow Kosovo Leader to Go to Italy*, CHI. TRIB., 6 May 1999.
- 18 *Milošević case* (123), Trial Tr. 4228-30 (3 May 2002).
- 19 At trial, Milutinović was acquitted and Šainović convicted. *Pros. v. Šainović et al.*, Judgment—Volume 3 of 4 ¶¶ 475, 1170 (26 Feb. 2009).
- 20 See Del Ponte’s chapter for further discussion of the *Bosnia* and *Croatia* indictments.
- 21 *Kosovo Indictment*. See Stat. ICTY, Art. 7(1), (3). Šainović was not charged under a superior responsibility theory because his position did not place him in formal control of forces in a way that would have given him legal responsibility to prevent or punish crimes committed by his subordinates.
- 22 Contrary to the default practice, in the indictment it is identified only by its Albanian name, Qerim. *Kosovo Indictment* ¶ 98(g).
- 23 *Kosovo Indictment* ¶ 100 (Count 4).
- 24 Scharf, *Indictment of Slobodan Milosevic*, ASIL INSIGHTS (1999).
- 25 Stat. ICTY, Art. 4.
- 26 SIMON, *LAWS OF GENOCIDE* 59–60.
- 27 Press Release, ICTY, President Milosevic and Four Other Senior FRY Officials Indicted (27 May 1999).
- 28 Perlez, *Milosevic Indictment Will Likely Frustrate Diplomatic Efforts*, N.Y. TIMES, 28 May 1999.
- 29 *War in Kosovo—End to the Air War*, S.F. CHRON., 9 June 1999.

## CHAPTER 6

- 1 See, e.g., CIGAR & WILLIAMS, PRIMA FACIE CASE FOR THE INDICTMENT OF SLOBODAN MILOSEVIC.
- 2 See Section II.B.
- 3 See BASSIOUNI, LAW OF THE ICTY Chs. 1–2 (on the relationship of the conflict to the ICTY).
- 4 S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (6 Oct. 1992) (Establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771).
- 5 Vulliamy, *Middle Managers of Genocide*. BOSNIA REPORT (July–Oct. 1996); HUM. RTS. WATCH, THE FALL OF SREBRENICA AND THE FAILURE OF UN PEACEKEEPING (1995); Rohde, *Eyewitnesses Confirm Massacres in Bosnia*, CHRISTIAN SCI. MONITOR (5 Oct. 1995).
- 6 Allcock, “International Criminal Tribunal,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 347, 357 (Ingrao & Emmert eds.).
- 7 Allcock, “International Criminal Tribunal,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 358 (Ingrao & Emmert eds.).
- 8 S.C. Res. 771, U.N. Doc. S/RES/771 (13 Aug. 1992).
- 9 S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (6 Oct. 1992).
- 10 S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (6 Oct. 1992).
- 11 See Sec. II.B.
- 12 SHARF, BALKAN JUSTICE 41; HAZAN, JUSTICE IN A TIME OF WAR 26–30.
- 13 SHARF, BALKAN JUSTICE 44; HAZAN, JUSTICE IN A TIME OF WAR 26–30.
- 14 LEBOR, COMPLICITY WITH EVIL 29. The comment was made in December 1992 at the Sarajevo airport.
- 15 See, e.g., U.N. Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 947, U.N. Doc. S/1995/222/Corr.1 (29 Mar. 1995).
- 16 WILLIAMS & SCHARF, PEACE WITH JUSTICE 71–72, 76–77. The U.K. also wanted to avoid having an independent Bosnia become a “Muslim state” in Europe. WILLIAMS & SCHARF, PEACE WITH JUSTICE 71–72.
- 17 See, e.g., Gelb, *Foreign Affairs: An Embrace Spurned*, N.Y. TIMES, 30 July 1992 (quoting Clinton, “If the Serbs persist in violating the terms of the current cease-fire agreement,” he said, “the United States should take the lead in seeking U.N. Security Council authorization for air strikes against those who are attacking the relief effort.”); Bill Clinton, TV Debate Bush, Clinton, and Perot (11 Oct. 1992) (transcript at

<http://www.nytimes.com/1992/10/12/us/the-1992-campaign-transcript-of-first-tv-debate-among-bush-clinton-and-perot.html?scp=3&sq=Clinton%2C+campaign+promise%2C+Yugoslavia&st=nyt&pagewanted=all>) (“I agree that we cannot commit ground forces to become involved in the quagmire of Bosnia ... I applaud the no-fly zone.... I think we should stiffen the embargo on the Belgrade Government and I think we have to consider whether or not we should lift the arms embargo now on the Bosnians since they are in no way in a fair fight with a heavily armed opponent bent on ethnic cleansing. We can’t get involved in the quagmire but we must do what we can.”); Engelberg & Mitchell, *Conflict in the Balkans: The American Policy*, N.Y. TIMES, 5 June 1995 (“Secretary of State Warren Christopher ... warned the White House against raising [the possibility of ground forces], arguing that it could be misunderstood as a promise of a much deeper American role than the Administration intended”).

- 18 See McAllister, *Atrocity and Outrage*, TIME, 17 Aug. 1992.
- 19 See, e.g., Williams, *No Amnesty for Perpetrators of Balkans Atrocities, U.S. Says: Warfare: Envoy Comments after Visiting a Mass Grave*, L.A. TIMES, 7 Jan. 1994 (discussing Albright’s vows for justice in the Balkans); Lepper, *War Crimes and the Protection of Peacekeeping Forces*, 28 AKRON L. REV. 411, 413 (1995) (“A great deal of credit for this tribunal really goes to Ambassador Madeleine Albright, who forcefully encourages her colleagues in the Security Council to accept the proposition that the international community needed to step in and address these atrocities.”)
- 20 WILLIAMS & SCHARF, PEACE WITH JUSTICE 77–79.
- 21 WILLIAMS & SCHARF, PEACE WITH JUSTICE 69–70.
- 22 WILLIAMS & SCHARF, PEACE WITH JUSTICE 69–70.
- 23 For a detailed discussion of the various European perspectives on the dissolution of Yugoslavia, see GLAUDIĆ, HOUR OF EUROPE, Klemenčić, “The International Community,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 153, 156–66 (Ingrao & Emmert eds.).
- 24 Klemenčić, “International Community,” in CONFRONTING THE YUGOSLAV CONTROVERSIES 170–73 (Ingrao & Emmert eds.).
- 25 See, e.g., BASS, STAY THE HAND OF VENGEANCE: POLITICS OF WAR CRIMES TRIALS 211–13 (discussing complaints by Frits Kalshoven, first



- chairman of the Commission, about British and French footdragging).
- 26 SCHARF, BALKAN JUSTICE 47–48; *see also* HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 41–42.
- 27 *See* Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), ¶¶ 241–53, U.N. Doc. S/1994/674, Annex (27 May 1994) [Commission Final Report]; *see also* SCHARF, BALKAN JUSTICE 48; HAGAN, JUSTICE IN THE BALKANS, 51–53.
- 28 *See* Commission Final Report, The Prijedor Report, ¶ 38, U.N. Doc. S/1994/674/Add.2 (Vol. I), Annex V, (28 Dec. 1994), [http://www.law.depaul.edu/centers\\_institutes/ihrli/downloads/V\\_a.pdf](http://www.law.depaul.edu/centers_institutes/ihrli/downloads/V_a.pdf); *see also* SCHARF, BALKAN JUSTICE 48; HAGAN, JUSTICE IN THE BALKANS 46–47.
- 29 Commission Final Report ¶ 32; SCHARF, BALKAN JUSTICE; HAGAN, JUSTICE IN THE BALKANS.
- 30 Commission Final Report ¶¶ 265–76, n.43; HAGAN, JUSTICE IN THE BALKANS 46–47.
- 31 *See, e.g.*, S.C. Res. 827, ¶ Preamble, U.N. Doc. S/RES/827 (25 May 1993) (noting the Council’s view that the Commission ought to continue its work “on an urgent basis” but also “pending the appointment of the Prosecutor”).
- 32 HAGAN, JUSTICE IN THE BALKANS 48–49.
- 33 Commission Final Report, ¶¶ 110–28 (Command Responsibility), ¶¶ 129–82 & Annex V (Ethnic Cleansing), and ¶¶ 231–52 & Annexes IX and IX.A (Rape); HAGAN, JUSTICE IN THE BALKANS 49 (quoting me stating, “our report revealed the large picture—the connection between Belgrade and the policy and tactics of ethnic cleansing.”). Prelec draws a different conclusion about what the evidence at trial says about Milošević’s role. Hartmann describes the Prosecution’s basic theory in *Milošević* in terms quite similar to those the Commission’s Final Report used, but sees the Prosecution minimizing Milošević’s role in related trials.
- 34 Commission Final Report ¶¶ 129–82 & Annex V (Ethnic Cleansing), ¶¶ 231–52 & Annexes IX and IX.A (Rape). The Final Report confirmed the Commission’s earlier view that “[b]ased on the many reports describing the policy and practices conducted in the former

Yugoslavia, ‘ethnic cleansing’ has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.”

Commission Final Report ¶ 129 (quoting the first interim report ¶ 56). For a compelling discussion of rape and ethnic cleansing in Bosnia from the victims’ perspective, see PARIS, SUN CLIMBS SLOW: ICC AND THE STRUGGLE FOR JUSTICE 200–34.

- 35 See Commission Final Report, ¶¶ 183–209 & Annex VI.A (Incident Study Report Regarding Mortar Shelling Sarajevo on 1 June 1993: Investigation).
- 36 See Commission Final Report; WILLIAMS & SCHARF, PEACE WITH JUSTICE 95–96.
- 37 S.C. Res. 780, ¶ 4, U.N. Doc. S/RES/780 (6 Oct. 1992) (Establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771).
- 38 See, e.g., Williams & Taft, *Role of Justice in the Former Yugoslavia*, 35 CASE W. RES. J. INT’L L. 219 (2003) (noting that information that would have facilitated Milošević’s indictment was withheld from the Prosecution because of “complications arising from domestic laws and delays in declassification.”).
- 39 See WILLIAMS & SCHARF, PEACE WITH JUSTICE 114–15 (discussing the Prosecution’s announced strategy aimed at higher-level actors prior to the arrest of Tadić, and the shift to include lower-level offenders thereafter). On that shift, see also Press Release, Press statement by Justice R.J. Goldstone, Prosecutor of the ICTY, CC/ {IO/033-S, 14 Feb. 1996 (“The Prosecutor is at pains to point out that his policy is to investigate and prosecute persons who may be responsible for war crimes irrespective of the political or ethnic group to which they belong. His investigations are evidence-driven and he welcomes information from all informed sources about all crimes and all persons who may be responsible.”); Press Release, Milan Martić, Radovan

Karadzic and Ratko Mladic indicted along with 21 other accused, CC/PIO/012e, 25 July 1995 (discussing the Prosecution's strategy, noting its focus on a "wide range of crimes" that "illustrate the variety of those accused in terms of rank and degree of participation"). Cf. Press Release, ICTY, Statement by the Prosecutor Following the Withdrawal of the Charges against 14 Accused, CC/PIU/314 (8 May 1998) (describing the Prosecution's strategy as "maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences").

- 40 See Whitney, *Balkan Accord: Overview; Balkan Foes Sign Peace Pact, Dividing an Unpacified Bosnia*, N.Y. TIMES, 15 Dec. 1995.
- 41 See U.N. Secretary-General, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/25274, Annex I (10 Feb. 1993), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/25274](http://www.un.org/ga/search/view_doc.asp?symbol=S/25274); S.C. Res. 808, ¶¶ 2, 3, & pmbl. U.N. Doc. S/RES/808 (22 Feb. 1993) ("Having considered the interim report of the Commission of Experts established by Resolution 780... in which the Commission observed that a decision to establish an ad hoc international tribunal in relation to the events in the territory of the former Yugoslavia would be consistent with the direction of its work.").
- 42 Cf. HAZAN, JUSTICE IN A TIME OF WAR 34–36, 43–47 (noting, regarding the initially unfunded and unstaffed ICTY, "[I]t is a strange lesson in moral leadership that the Security Council is offering to the world by creating the ICTY. The tribunal resembles a theater play, with members of the security council acting as unusually incompetent stage managers, incapable of agreeing on the script, performance dates, production budget, or even the likely director."). See also SCHARF, BALKAN JUSTICE 41; ICTY's annual reports from 1994 to 1998, each entitled "Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991": U.N. Doc. A/49/342, S/1994/1007 (29 Aug. 1994); U.N. Doc. A/50/365, S/1995/728 (23 Aug. 1995); U.N. Doc. A/51/292, S/1996/665 (16 Aug. 1996); U.N. Doc. A/52/375,



S/1997/729 (18 Sept. 1997); U.N. Doc. A/53/219, S/1998/737 (10 Aug. 1998).

- 43 See HAGAN, JUSTICE IN THE BALKANS 34–35.
- 44 WILLIAMS & SCHARF, PEACE WITH JUSTICE 15.
- 45 For a discussion of the extent to which the Secretary General viewed humanitarian aid as potentially undermining the UN’s impartiality, see Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998), “Srebrenica Report,” ¶¶ 129–30, in 3 SREBRENICA 1995, at 89–90 (Smail Čekić, Muharem Kreso & Bećir Macić eds., 2001).
- 46 HAGAN, JUSTICE IN THE BALKANS 70.
- 47 HAGAN, JUSTICE IN THE BALKANS 64. This included Clint Williamson.
- 48 See CHOLLET, ROAD TO THE DAYTON ACCORDS: A STUDY OF AMERICAN STATECRAFT (2005); WILLIAMS & SCHARF, PEACE WITH JUSTICE.
- 49 HAZAN, JUSTICE IN A TIME OF WAR 67.
- 50 See General Framework Agreement for Peace in Bosnia and Herzegovina (14 Dec. 1995) [Dayton Accords], Annex 1A, Art. X (obliging parties to cooperate with the ICTY); Dayton Accords, Annex 11, Art. VI(1) (describing the International Police Task Force’s obligations to report information to the ICTY). Dayton Accords, Annex 4 (Const.), Art. IX(1).
- 51 HAZAN, JUSTICE IN A TIME OF WAR 68.
- 52 HAZAN, JUSTICE IN A TIME OF WAR 72.
- 53 See General Framework Agreement for Peace in Bosnia and Herzegovina (14 Dec. 1995), Annex 1A, Art. VIII(4) (barring indictees from the Military Commission), Art. IX(1)(g) (obligating parties to transfer to the ICTY indictees being held as prisoners); Gaeta, *Is NATO Authorized or Obligated to Arrest Persons Indicted by the ICTY?*, 9 EUR. J. INT’L L. 174 (1998). For early critiques of NATO, see Perlez, *NATO Backs Off Helping Bosnia War Crimes Panel*, N.Y. TIMES, 20 Jan. 1996; Hedges, *Bosnia Limits War-Crimes Arrests after NATO Delivers 2 Suspects*, N.Y. TIMES, 13 Feb. 1996; Soloway & Hedges, *How Not to Catch a War Criminal*, U.S. NEWS & WORLD REPORT, 1 Dec. 1996, at 63.
- 54 HAZAN, JUSTICE IN A TIME OF WAR 66–69.
- 55 WILLIAMS & SCHARF, PEACE WITH JUSTICE 16.



- 56 See also SCHARF & SCHABAS, MILOSEVIC ON TRIAL; CIGAR, WILLIAMS & BANAC, INDICTMENT AT THE HAGUE; SCHARF & WILLIAMS, PEACE WITH JUSTICE.
- 57 See HENRIKSEN, NATO'S GAMBLE: COMBINING DIPLOMACY AND AIRPOWER IN THE KOSOVO CRISIS.
- 58 For a detailed analysis of this proposition, see Gow, "War in Kosovo, 1998–1999," in CONFRONTING THE YUGOSLAV CRISIS 306–37, 333–36 (Ingrao & Emmert eds.).
- 59 WILLIAMS & SCHARF, PEACE WITH JUSTICE 65, 68, 73.
- 60 See Gow, "War in Kosovo, 1998–1999" at 326–30.
- 61 See, e.g., Secretary of State Madeleine K. Albright and Justice Louise Arbour, International Criminal Tribunal for the Former Yugoslavia, Joint Press Conference, Washington, DC, 30 Apr. 1999, Office of the Spokesman, U.S. Department of State, <http://secretary.state.gov/www/statements/1999/990430a.html>. That support continued after the conflict. U.S. contributions, which totaled 700,000 USD by 1997, reached 13 million USD by 2001. Compare Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/52/375, S/1997/729, ¶ 163 (18 Sept. 1997), with Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/56/352, S/2001/865, ¶ 239 (17 Sept. 2001). On the ICTY's annual budgets, see "Cost of Justice," ICTY (Web site), <http://www.icty.org/sid/325>; Wippman, *Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006). See also SCHARF & SCHABAS, MILOSEVIC ON TRIAL 103 (an indictment against Milošević would "bolster the political will of NATO countries to continue the bombing campaign and would ultimately force Milosevic to accept NATO'S terms for Kosovo."). However, it is not clear that the NATO allies were in agreement that an indictment would be helpful. See Williamson at 90–91.
- 62 WILLIAMS & SCHARF, PEACE WITH JUSTICE 116–17. Prelec and Greenawalt each discuss the problem of the evidence available and its

quality; Prelec in particular draws a different conclusion than I do about it.

- 63 See, e.g., *Pros. v. Aleksovski*, Indictment ¶¶ 8–21, 35–38 (10 Nov. 1995). See generally *Pros. v. Brđanin* (5), Sixth Amended Indictment (9 Dec. 2003); *Pros. v. Babić* (1), Indictment (6 Nov. 2003); *Pros. v. Blaškić* (3), Second Amended Indictment (25 Apr. 1997); see also Calic, “Ethnic Cleansing and War Crimes 1991–1995,” in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 115, 132 (Ingrao & Emmert eds.).
- 64 Brown, “ICTY,” in *INTERNATIONAL CRIMINAL LAW* 69 (Bassiouni ed.); Danner, “Joint Criminal Enterprise,” in *INTERNATIONAL CRIMINAL LAW* 483 (Bassiouni ed.); Wallach & Marcus, “Command Responsibility,” in *INTERNATIONAL CRIMINAL LAW* 459 (Bassiouni ed.). See also Stat. ICTY, Art. 7.
- 65 Stat. ICTY, Art. 7(3) (“the fact that any of the acts referred to in articles 2 to 5 ... was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”). See Wallach & Marcus, “Command Responsibility,” in *INTERNATIONAL CRIMINAL LAW* 459 (Bassiouni ed.).
- 66 *Pros. v. Karadžić & Mladić* (4), Indictment (Srebrenica) (14 Nov. 1995); *Pros. v. Karadžić & Mladić* (3), Indictment (Sarajevo) (24 July 1995).
- 67 See DEL PONTE, MADAME PROSECUTOR 109–20; Del Ponte at 136–37 (discussing her staff’s concern, even later, about devoting resources to the *Milošević* case when it was thought unlikely that he would actually ever be transferred); see also Greenawalt at 383 (describing this as a kind of “prosecutorial meta-*Realpolitik*”).
- 68 Cf. Kissinger, “World Restored: Metternich, Castlereagh and the Problems of Peace,” at 1, cited in GLAUDIĆ, HOUR OF EUROPE 309 (“Whenever peace—conceived as the avoidance of war—has been the primary objective of a power or a group of powers, the international system has been at the mercy of the most ruthless member of the international community.”).

- 69 For a discussion of the Prosecution's reliance on and shared worldview with NATO, seen in the contours of its inquiry into the bombing campaign, see Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals*, 35 N.Y.U. J. INT'L L. & POL. 1015.

## CHAPTER 7

- 1 *Pros. v. Milošević* (15), Appeal Joinder Ruling (1 Feb. 2002); *Pros. v. Milošević* (13), Appeal Joinder Decision (18 Apr. 2002).
- 2 *Pros. v. Milošević* (21), Decision on Review of Indictment (24 May 1999).
- 3 *Kosovo* indictment ¶¶ 5, 7.
- 4 *Kosovo* indictment ¶ 6.
- 5 *Kosovo* indictment ¶¶ 34ff.
- 6 *Kosovo* indictment ¶ 27 (relying on Article 7(3)).
- 7 Press Release, ICTY, Statement by Justice Louise Arbour, Prosecutor ICTY (27 May 1999).
- 8 *Milošević case* (68), Prosecution's Second Pre-Trial Brief (Croatia and Bosnia Indictments) ¶¶ 1–4 (31 May 2002) [Croatia and Bosnia pretrial brief].
- 9 *Croatia* indictment ¶¶ 32ff.
- 10 *Croatia* indictment ¶ 596.
- 11 *Croatia* indictment ¶¶ 32ff.
- 12 See *Bosnia* indictment, ¶¶ 6, 9, 22, 53, 65; *Croatia* indictment, ¶¶ 6, 9, 22, 103.
- 13 See *Kosovo* indictment, ¶ 6.
- 14 *Milošević case* (84), Trial Tr. 9 (12 Feb. 2002).
- 15 *Milošević case* (5), *Amici* Acquittal Motion (3 Mar. 2004). See Nielsen and Waters.
- 16 *Milošević case* (64), Prosecution Acquittal Response ¶¶ 237, 337, 415 (3 May 2004).
- 17 See, e.g., *Milošević case* (146), Witness Čedomir Popov, Trial Tr. 34587 (15 Dec. 2004) (Prosecution explaining that the concept of "Greater Serbia" did not play a significant part in the prosecution case); *Milošević case* (150), Witness Vojislav Šešelj, Trial Tr. 34587–

- 8; 43218–9; 43224–5 (25 Aug. 2005) (Prosecution seeking to distinguish between the idea of all Serbs living in one state and the historical concept of “Greater Serbia”).
- 18 *Milošević case* (149), Trial Tr. 42887 (Aug. 19, 2005); *Ibid.* at 43201 (24 Aug. 2005).
- 19 *Milošević case* (152), Trial Tr. 43320–1 (25 Aug. 2005).
- 20 *Milošević case* (151), Trial Tr. 43265–6 (25 Aug. 2005).
- 21 ICTY, R. P. & EVID., IT/32, R. 48.
- 22 ICTY, R. P. & EVID., IT/32, R. 49.
- 23 *Pros. v. Krnojelac*, Third Amended Indictment (25 June 2001).
- 24 *See, e.g., Pros. v. Naletilić & Martinović*, Indictment (18 Dec. 1998) (as permitted by Rules 48 and 49, charging both accused with multiple crimes in a single indictment).
- 25 ICTY, R. P. & EVID., IT/32, R. 2.
- 26 *See, e.g., Pros. v. Brđanin & Talić* (3), IT-99-36-PT, Decision on Objections by Talić ¶ 40 (Feb. 20, 2001). *See also* BOAS, BISCHOFF & REID, ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 319–23 (discussing the ICTY’S jurisprudence on cumulative and alternative charging).
- 27 *See generally* BOAS, BISCHOFF & REID, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 7–141, 426.
- 28 *See, e.g., Pros. v. Haradinaj, Balaj, & Brahimaj* (2), Decision on Motion to Amend the Indictment ¶ 6 (25 Oct. 2006) (“*Haradinaj et al. Pre-Trial Indictment Decision*”) (regarding a proposed second consolidated amended indictment).
- 29 *See Pros. v. Milutinović et al.*, IT-99-37-PT.
- 30 *See Pros. v. Milutinović et al.*, IT-99-37-PT.
- 31 *See Pros. v. Mejakić et al.*, IT-95-4-PT & *Pros. v. Fuštar et al.*, Decision on Prosecution’s Motion for Joinder of Accused (17 Sept. 2002) (discussing denial of joinder and citing Rules 48 and 82(B), the latter providing that a “Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice”).
- 32 *Pros. v. Popović*, IT-02-57-PT, *Pros. v. Beara*, IT-02-58-PT, *Pros. v. Nikolić*, IT-02-63-PT, *Pros. v. Borovčanin*, IT-02-64-PT, *Pros. v.*



- Tolimir, Miletić & Gvero*, IT-04-80-PT, *Pros. v. Pandurević & Trbić*, Decision on Motion for Joinder, Separate Opinion of Judge Patrick Robinson ¶ 1 (21 Sept. 2005).
- 33 Decision on Motion for Joinder, Separate Opinion of Judge Patrick Robinson ¶ 2 (21 Sept. 2005).
- 34 Decision on Motion for Joinder, Separate Opinion of Judge Patrick Robinson at ¶ 4 (21 Sept. 2005) (quoting *Pros. v. Milošević* (7), Decision on Interlocutory Appeal by the *Amici Curiae* ¶ 18 (20 Jan. 2004)).
- 35 See BOAS, MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 68.
- 36 See *Pros. v. Milošević* (6), IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence ¶ 20–22 (21 Oct. 2003) (Majority Decision Given 30 Sept. 2003); *Pros. v. Nyiramasuhuko*, ICTR-98-42-A15bis, Decision in the Matter of Proceedings under Rule 15bis (D), Dissenting Opinion of Judge David Hunt ¶ 17 (24 Sept. 2003).
- 37 ICTY, R. P. & EVID., IT/32, R. 82.
- 38 See, e.g., *Pros. v. Brđanin & Talić* (1), Decision on Request to Appeal 4 (16 May 2000); *Pros. v. Karemera, Ngirumpatse & Nziorera*, ICTR-98-44-AR73.16, Decision on Appeal concerning the Severance of Matthieu Ngirumpatse ¶ 16 (19 June 2009) (reaffirming, at the outset of its analysis, that “[d]ecisions related to the general conduct of trial are matters within the discretion of the Trial Chamber”).
- 39 See, e.g., *Pros. v. Brđanin & Talić* (2), Decision on Prosecution’s Oral Request for Separation of Trials 9, ¶¶ 26–29 (20 Sept. 2002); *Pros. v. Strugar & Kovačević*, Decision on the Prosecutor’s Motion for Separate Trial 2–3 (26 Nov. 2003).
- 40 *Pros. v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević & Trbić*, Decision on Severance of Case against Milorad Trbić 4, n.13 (26 June 2006) (collecting cases).
- 41 *Pros. v. Milošević* (27), Motion for Joinder (10 Dec. 2001).
- 42 *Pros. v. Milošević* (28), Prosecution Joinder brief ¶ 13 (27 Nov. 2001).
- 43 *Pros. v. Milošević* (28), Prosecution Joinder brief ¶ 14–7.
- 44 *Pros. v. Milošević* (28), Prosecution Joinder brief ¶ 18.
- 45 *Pros. v. Milošević* (28), Prosecution Joinder brief ¶ 18–9.

- 46 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 3 (13 Dec. 2001).
- 47 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 36.
- 48 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 42.
- 49 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 43.
- 50 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 44.
- 51 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 45.
- 52 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision.
- 53 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 38.
- 54 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 48.
- 55 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 50.
- 56 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 47.
- 57 *Pros. v. Milošević* (26), Trial Chamber Joinder Decision ¶ 50.
- 58 *Pros. v. Milošević* (15), Appeal Joinder Ruling.
- 59 *Pros. v. Milošević* (15), Appeal Joinder Ruling.
- 60 *Pros. v. Milošević* (13), Appeal Joinder Decision ¶ 13.
- 61 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 14.
- 62 ICTY, R. P. & EVID., IT/32, R. 2.
- 63 ICTY, R. P. & EVID., IT/32, R. 2.
- 64 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 15.
- 65 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 15.
- 66 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 17.
- 67 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 20.
- 68 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 21.
- 69 *Pros. v. Milošević* (15), Appeal Joinder Ruling ¶ 20.
- 70 *Pros. v. Milošević* (15), Appeal Joinder Ruling.
- 71 *Pros. v. Milošević* (13), Appeal Joinder Decision ¶ 20.
- 72 *Pros. v. Milošević* (13), Appeal Joinder Decision ¶ 26 (18 Apr. 2002).
- 73 *Milošević case* (35), Further Order on Future Conduct of the Trial (21 July 2004).
- 74 *Milošević case* (36), Prosecution Submission in Response to Trial Chamber's "Further Order on Future Conduct of the Trial" (27 July 2004); *Amici curiae* Submissions on the Trial Chamber's Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments dated July 21, 2004 (27 July 2004); Addendum to

- “Prosecution Submission in Response to the Trial Chamber’s 19 July 2004 Further Order on Future Conduct of the Trial” (6 Aug. 2004); Addendum to “Prosecution Submission in Response to the Trial Chamber’s 21 July 2004 Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments” (6 Aug. 2004).
- 75 *Milošević case* (75), Recommencement of Trial (25 Aug. 2004).
- 76 This is apparent from the brief discussion of severance in the Chamber’s decision assigning counsel, as well as a subsequent decision on the issue. *Milošević case* (72), Reasons for Decision on Assignment of Counsel ¶ 17 (22 Sept. 2004); *Milošević case* (10), Severance and Time Decision ¶ 7 (12 Dec. 2005).
- 77 *Milošević case* (76), Scheduling Order for a Hearing 4 (22 Nov. 2005).
- 78 See, *Milošević case* (65), Prosecution Submission in Response to Trial Chamber’s “Scheduling Order for a Hearing” on Severing the Kosovo Indictment (29 Nov. 2005) (prosecution position); *Milošević case* (155), Trial Tr. 46696 (29 Nov. 2005) (Milošević’s position); *Milošević case* (156), Trial Tr. 46697-711 (29 Nov. 2005) (position of assigned counsel); *Milošević case* (157), Trial Tr. 46711-5 (29 Nov. 2005) (position of *amicus curiae*).
- 79 *Milošević case* (10), Severance and Time Decision (the Chamber, instead of explaining why severance would be inappropriate, instead relied upon a strict enforcement of time limits).
- 80 See generally BOAS, MILOŠEVIĆ TRIAL.
- 81 Schabas, *Mens Rea and the ICTY*, 37 NEW ENG. L. REV. 1015, 1032 (2003). For a detailed discussion of JCE, see BOAS, BISCHOFF & REID, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW ch.2.
- 82 *Pros. v. Martić*; *Pros. v. Stanišić & Simatović*; *Pros. v. Šešelj* (10), Decision on Prosecution Motion for Joinder (10 Nov. 2005).

## CHAPTER 8

- 1 ICTY, R. P. & EVID., IT/32/Rev. 46, R.49 (11 Feb. 1994) (emphasis added).
- 2 *Pros. v. Milutinović, Šainović & Ojdanić*, IT-99-37-PT & *Pros. v. Pavković, Lazarević, Đorđević & Lukić*, Decision on Prosecution Motion for Joinder (8 July 2005).

- 3 *Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 337 (30 Jan. 2002).
- 4 DEL PONTE & SUDETIC, MADAME PROSECUTOR 142.
- 5 DEL PONTE & SUDETIC, MADAME PROSECUTOR 142.
- 6 Stat. ICTY, Art. 21(4)(c).
- 7 *Pros. v. Milošević* (13), Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder ¶ 7 (18 Apr. 2002) [Appeals Chamber Decision].
- 8 Appeals Chamber Decision ¶ 27.
- 9 *Pros. v. Milošević* (10), Decision on Prosecution's Motion for Joinder ¶ 20 (13 Dec. 2001).
- 10 *Pros. v. Milošević* (13), Appeals Chamber Decision ¶¶ 22–32.
- 11 *Pros. v. Milošević* (13), Appeals Chamber Decision ¶ 24.
- 12 *Pros. v. Milošević* (29) Public Transcript of Hearing 111 (11 Dec. 2001).
- 13 *Pros. v. Milošević* (29), Public Transcript of Hearing 111 (11 Dec. 2001), at 118–19 (Kay speaking).
- 14 *Pros. v. Milošević* (12), Interlocutory Appeal Hearing, Trial Tr. 365-6 (11 Dec. 2001).
- 15 *Pros. v. Milošević* (14), Decision on Prosecution's Motion for Joinder ¶ 50 (13 Dec. 2001).
- 16 *Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 366 (30 Jan. 2002) (*Amicus* Kay pointing out that before the Trial Chamber that Wladimiroff and he had “in light of the estimates of trial which had been given... [been] alarmed at the prospect of any individual having to face such an ordeal”).
- 17 *Pros. v. Milošević* (13), Appeals Chamber Decision ¶ 7.
- 18 *Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 296 (30 Jan. 2002) (Del Ponte adding: “we do not have *partie civile*, but the victims are here, and there are many of them.”)
- 19 BOAS, MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 111. Of course, the crime base for each indictment was so large that this would also have been true of any one indictment tried separately.
- 20 BOAS, MILOŠEVIĆ TRIAL 111–12.



- 21 *Pros. v. Milošević* (10), Decision on Prosecution's Motion for Joinder ¶ 37 (13 Dec. 2001).
- 22 *See Pros. v. Bagosora*, ICTR-96-7 & *Pros. v. Kabiligi & Ntabakuze*, ICTR-97-34 and ICTR-97-30 & *Pros. v. Nsengiyumva*, ICTR-96-12, Decision on the Prosecutor's Motion for Joinder ¶¶ 120–21 (29 June 2000) (“At this stage of the proceedings, only allegations can be made. These allegations will have to be proved at trial. This is not the stage of the proceedings where proof is established. We are not having two trials; one at the joinder stage and one at the trial stage”).
- 23 *See Pros. v. Milošević* (29), Public Transcript of Hearing 127–33 (11 Dec. 2001).
- 24 *See Pros. v. Milošević* (29), Public Transcript of Hearing 69 (11 Dec. 2001).
- 25 *See Pros. v. Milošević* (29), Public Transcript of Hearing 69–70 (11 Dec. 2001).
- 26 BOAS, MILOŠEVIĆ TRIAL 4, 277.
- 27 *See Mégret, In Defense of Hybridity*, 38 CORNELL INT'L L.J. 725 (2005) (arguing that international criminal justice should be “representational” of the globality of what occurred in particular criminal instances, not merely mechanistically process individual criminal incidents).
- 28 *See Mégret, In Defense of Hybridity* 725 (arguing that ICL has a fundamental obligation to do the best possible justice to the events and not just the persons involved).
- 29 The wording comes from ICTY, R. P. & EVID., IT/32/Rev.46, R.2.
- 30 *See Pros. v. Milošević* (29), Public Transcript of Hearing 130–31 (11 Dec. 2001) (Tapušević describing as an “absurd assertion and ludicrous attitude” the fact that events in Kosovo are presented as part of a plan to create a Greater Serbia, given that Kosovo was already part of Serbia).
- 31 *See Pros. v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva*, ICTR-98-41-7, Judgement and Sentence (18 Dec. 2008); *Pros. v. Ndindiliyimana, Bizimungu, Nzuwonemeye & Sagahutu*, ICTR-00-56-T, Judgement and Sentence (17 May 2011).

## CHAPTER 9

- 1 *Pros. v. Milošević* (2), Initial Indictment “Croatia” (27 Sept. 2001); *Pros. v. Milošević* (3), Initial Indictment “Bosnia and Herzegovina” (22 Nov. 2001).
- 2 Stat. ICTY, 32 I.L.M. 1192, Art. 7(1) & 7(3) (25 May 1993).
- 3 *Pros. v. Tadić* (2), Appeal Judgment ¶¶ 189–90 (15 July 1999).
- 4 See, e.g., *Pros. v. Martić* (1), Judgment (12 June 2007); *Pros. v. Milutinović et al.* (2), IT-05-87-T, Judgment (26 Feb. 2009).
- 5 The Prosecution filed its motion in November 2001. See *Pros. v. Milošević* (24), Prosecution’s Motion for Joinder (27 Nov. 2001). See Prelec and Boas on this issue.
- 6 See *Pros. v. Milošević* (26), Decision on Prosecution’s Motion for Joinder (13 Dec. 2001). The Prosecution filed an interlocutory appeal in January 2002. See *Milošević case* (19), Interlocutory Appeal from Refusal to Order Joinder (1 Feb. 2002); *Pros. v. Milošević* (5), Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (18 Apr. 2002).
- 7 *Pros. v. Krstić* (1), IT-98-33-A, Appeal Judgment ¶¶ 5–38 (19 Apr. 2004).
- 8 *Milošević case* (1) 98bis Decision (16 June 2004).
- 9 Fairlie, *Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit*, 4 INT’L CRIM. L. REV. 243, 299 (2004) (“It is the opinion of many, however, that the length of international criminal proceedings at the Tribunal can be attributed to the adoption of the adversarial system for the ICTY.”).
- 10 For example, Rules 65ter (assigning a pretrial judge capable of narrowing the issues for trial) and 73ter (allowing the Trial Chamber to streamline time spent on witness testimony by the defense) were added since the 18th Plenary on 9–10 July 1998. For additional examples, see Mundis, *From “Common Law” Towards “Civil Law”: The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT’L L. 367 (2001).
- 11 Among numerous examples, see *Milošević case* (138), Trial Tr. (21, 22, 23, 26, 29 May 2003). See also Simons, *Richard May, Milosevic Judge, Dies at 65*, N.Y. TIMES, 2 July 2004.
- 12 See, e.g., *Milošević case* (67), Prosecution’s Position in Relation to Management of Trial Proceedings ¶ 2 (5 Apr. 2002) (asking the

Chamber to consider procedural changes: “a) The use of ‘92bis’ statements for aspects of the case other than deportation ‘crime base’ evidence and the calling of witnesses additional to those already listed in respect of the Kosovo indictment; b) The use of witnesses to summarise, review or give overviews of collections of material covering crime base evidence or material; c) The use of binders of potential evidence material covering particular locations; d) The timing of witnesses whose evidence is common to more than one of the three indictments; and e) Possible new procedures to save court time such as having joint hearings for ‘crime base’ evidence common to more than one trial[.]”).

- 13 *Pros. v. Milošević* (8), Order for Commencement of Trial (4 Feb. 2002).
- 14 *See, e.g., Milošević case* (99), Trial Tr. 1045:24-25, 1046:1, 1047:1-16, 1102:23-25, 1103:1-4, 1005:16-22 (26 Feb. 2002) (testimony of Ajmane Behrami, who first denied any connection between her husband and the KLA).
- 15 *See, e.g., Milošević case* (20), Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (10 Apr. 2003) (out of 482 paragraphs adjudicated facts, the Trial Chamber admitted 130 paragraphs of facts).
- 16 *See* ICTY, R. P. & EVID., IT/32/Rev. 28, R.73bis (17 July 2003).
- 17 *See, e.g., Fisher, Milošević Grills Witnesses Too Harshly, His Prosecutors Complain*, N.Y. TIMES, 27 Feb. 2002.
- 18 *Pros. v. Milošević* (19), IT-99-37-I, Written Note by the Accused, Registry 3371-2 (July 3, 2001); *Pros. v. Milošević* (33), Trial Tr. 1:18-25, 2:1-6 (3 July 2001). Anoya discusses Milošević’s self-representation in detail.

- 19 *Milošević case* (80), Trial Tr. 16:24-25, 18:1-6 (30 Aug. 2001). The first reasoned decision of the Trial Chamber concerning the question of self-representation was handed down on 4 April 2003. *See Milošević case* (73), Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (4 Apr. 2003).
- 20 Stat. ICTY, 32 I.L.M. 1192, Art. 21(d); ICTY, R. P. & EVID., IT/32/Rev. 28, R. 42(B) & 45(F) (17 July, 2003).
- 21 *Pros. v. Milošević* (22), Order Inviting Designation of *Amicus Curiae* (30 Aug. 2001). *Cf.* Waters at 302-03, drawing the opposite conclusion about the *Amici's* identification with Accused and Chamber.
- 22 *See, e.g., Pros. v. Milošević* (19), Written Note by the Accused, Registry 3371-2 (3 July 2001); *Pros. v. Milošević* (34), Trial Tr. 2:1-6 (3 July 2001).
- 23 *Milošević case* (78), Office of the Prosecutor on Future Conduct of the Case in Light of the State of the Accused's Health ¶ 4 (8 Nov. 2002):

The accused, while persistently refusing to recognize the International Tribunal, has nevertheless chosen to participate actively in the proceedings, in particular by conducting extensive cross-examination of Prosecution witnesses. In effect he has elected to conduct his own defence, at all times refusing the assistance of counsel. By doing so he has inevitably increased the strain on his own health. It cannot be right in principle for the scope of a criminal trial to be dictated by the fact that the accused elects to represent himself. It would create a very dangerous precedent to allow difficulties that are largely self-imposed to obtain for the accused a trial that is significantly less complete than it would otherwise be[.]

In addition, the Prosecution argued that “Because of the ill health it can be seen objectively that the single-handed carriage of the entire conduct of the defense case is beyond the accused[.]” *“Milošević case* (70), Submission on Implications of Accused's Recurring Ill-Health ¶ 26 (29 Sept. 2003).

- 24 *See, e.g., Fisher, Milosevic Grills Witnesses Too Harshly, His Prosecutors Complain*, N.Y. TIMES, 27 Feb. 2002 (explaining that the Chamber was limiting objections registered by the Prosecution).
- 25 *See, e.g., Milošević case* (147), Trial Tr. 38876:3-8 (27 Apr. 2005) (“Mr Nice: Your Honours, the evidence of this witness [Dragan Jašović] was first forecast and dealt with six sitting days or five sitting days ago, on the 14th of April, when Your Honour indicated that you would hear from the witness, it was then expected, on a Tuesday to come, cross-



- examination to be postponed to a date to be fixed. There's been an interruption since then occasioned by the ill health of the accused[.]”).
- 26 Parker, Report to the President: Death of Slobodan Milošević ¶ 39 (30 May 2006) (“These results confirm that Mr. Milošević died from natural causes, a heart attack.”) [PARKER REPORT].
- 27 See PARKER REPORT ¶ 111 (“... Mr. Milošević disrupted his prescribed treatment and ignored medical advice given to him by the treating officer at UNDU, his treating cardiologist, Dr Van Dijkman, and others ...”).
- 28 See PARKER REPORT ¶ 2 (Autopsy results showed that “(n)o rifampicin was found in his body.”).
- 29 See PARKER REPORT ¶ 40 (“Mr. Milošević was referred to an experienced cardiologist of high standing, Dr van Dijkman, when he arrived at UNDU... At different times during his detention, if other significant health problems arose, Mr. Milošević was referred on such occasions to experienced doctors specialising in the appropriate field. Throughout his detention the primary treating physician of Mr. Milošević was the medical officer of UNDU, Dr Falke.”).
- 30 PARKER REPORT ¶ 115:

On 31 August 2004, the Commanding Officer of UNDU submitted to the then Deputy Registrar an Internal Memorandum setting out concerns about the adverse effect of the privileged facilities at UNDU on his capacity to ensure that Mr. Milošević would not take non-prescribed medication. In a further Internal Memorandum to the then Deputy Registrar dated 14 October 2004, the Commanding Officer of UNDU outlined his concerns that the privileged setting provided to Mr. Milošević may be misused. Such concerns resulted from a number of incidents in which it was discovered that Mr. Milošević had non-authorized items in his privileged room in UNDU, including non-prescribed medication. The Commanding Officer of UNDU concluded by saying “[i]t has become increasingly difficult for UNDU to ensure the safety and security of Mr. Milošević or the safety of his visitors.”

## CHAPTER 10

- 1 Del Ponte at 138.
- 2 See generally ARMATTA, TWILIGHT OF IMPUNITY.
- 3 Del Ponte at 145.
- 4 *Pros. v. Lubanga* (3), ICC Decision on Witness Familiarisation and Witness Proofing ¶¶ 18–42 (8 Nov. 2006); *Pros. v. Lubanga* (2), ICC,

Decision Regarding Practices Used to Prepare and Familiarise Witnesses ¶¶ 28–29, 57 (30 Nov. 2007).

- 5 Del Ponte at 146.
- 6 Del Ponte at 147.
- 7 Del Ponte at 148.
- 8 Del Ponte at 146.
- 9 Del Ponte at 148.
- 10 See especially HUM. RTS. WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL*; Neier, *Milosevic's Trial Was Not in Vain*, PROJECT SYNDICATE, 20 Mar. 2006.

## CHAPTER 11

- 1 See Cerruti, *Self-Representation in the International Arena*, 40 GEO. J. INT'L L. 919 (2009).
- 2 See BOAS, MILOŠEVIĆ TRIAL (for a comprehensive overview of the tactics used in the *Milošević* case).
- 3 See, e.g., Stat. Special Trib. Leb., Art. 16; Stat. Special Trib. Sierra Leone, Art. 17(4), which is similar to both the Statutes of the ICTY (Art. 21 (4)) and ICTR (Art. 20(4)). The Special Tribunal for Lebanon also requires defendants to notify the court in writing of their intention to defend themselves, and allows the “Pre-Trial Judge or Chamber [to] impose counsel present or otherwise assist the accused in accordance with international criminal law and international human rights where this is deemed necessary in the interests of justice and to ensure a fair and expeditious trial.” Special Trib. Leb., R. P. & EVID. 59(F). See also Boas, *Self Representation before the ICTY: A Case for Reform*, 9 J. INT'L CRIM. JUST. 70 (2011).
- 4 See *Pros. v. Milošević* (7), Decision on Interlocutory Appeal by the *Amici Curiae* ¶ 19 (20 Jan. 2004) (“There is no doubt that, by choosing to conduct his own defence, the accused deprived himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel, The legal system’s respect for a defendant’s decision to forgo assistance of counsel must be reciprocated by the acceptance of responsibility for the disadvantages this choice may bring.”).

- 5 See HUM. RTS. WATCH, THE BALKANS: WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOŠEVIĆ TRIAL, No. 10(D), n.273 (Dec. 2006).
- 6 See *Milošević case* (54), Order to Registry Concerning Practical Facilities Available to Accused (7 Mar. 2002) (“Upon his admission to the Tribunal’s Detention Unit (UNDU) on 29 June 2001, the accused has gone through the standard judicial admission procedure at the facility. This procedure, carried out by judicial staff of the Registry, included the notification of an arrest warrant in the name of the accused addressed to the Federal Republic of Yugoslavia, the indictment IT-99-37-I, and the oral reading of Article 21 of the Tribunal’s Statute and Rules 42 and 43 of the Rules of Procedure and Evidence. Upon [being] given notice of his rights, the accused expressly waived his right to have the indictment read out to him. The accused was asked whether he had any questions regarding the indictment, the arrest warrant, or his rights. He did not ask any questions.”).
- 7 For The Hague District Court, see *Milošević v. The Netherlands*, KG 01/975 (31 Aug. 2001); for the ECHR, see *Milošević v. The Netherlands*, Application no. 77631/01 (19 Mar. 2002). The Application submitted before the ECHR listed the following lawyers and professors as representing him: N.M.P. Steijnen, Zeist, the Netherlands; Z. Tomanovic, Belgrade; Ch. Black, Richmond Hill, Ontario; Professor M.N. Kouznetsov, Moscow; D.M. Ognjanovic, Belgrade; Professor A. Tremblay, Montréal; and Professor A. Bernardini, Rome.
- 8 See Cohen, *Milošević to Represent Himself at His Arraignment Today*, N.Y. TIMES, 3 July 2001 (““Due to the fact that he does not recognize the tribunal, he is not going to call any lawyers to appear before the tribunal,’ said Zdenko Tomanović, a Belgrade lawyer who arrived here today to represent Mr. Milošević. ‘We will not appear before the tribunal tomorrow.’”).
- 9 Cf. *Pros. v. Milošević* (17), Initial Appearance, Trial Tr. 2 (3 July 2001) (“I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ [*sic*].”).

- 10 ICTY, R. P. & EVID., IT/32/Rev. 22 (28 Dec. 2001).
- 11 If we consider the Statute and RPE as constitutive of the Tribunal in operation, their silences and abeyances “can only be assimilated by an intuitive social acquiescence in the incompleteness of a constitution.” FOLEY, SILENCE OF CONSTITUTIONS 10. See DWORKIN, TAKING RIGHTS SERIOUSLY 17 (“The set of these valid legal rules is exhaustive of ‘the law,’ so that if someone’s case is not clearly covered by such a rule ... then that case cannot be decided by ‘applying the law.’ It must be decided by some official, like a judge, ‘exercising his discretion,’ which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.”).
- 12 See Robinson, *Ensuring Fair and Expeditious Trials at the ICTY*, 11 EUR. J. INT’L L. 569, 574 (2000).
- 13 See, e.g., *Pros. v. Blaskić* (4), Judgment on Request of Croatia for Review of Trial Chamber II Decision (29 Oct. 1997) (stating the criteria that parties must fulfill for the Chamber to issue a subpoena to produce documents, now found in Rule 54*bis*).
- 14 See SOLOMON, PILLARS OF POWER: AUSTRALIAN INSTITUTIONS 105–06 (In the past 20 years, the “greatest contemporary challenge for Australian courts is a huge increase in unrepresented litigants.” “How far does one go to accommodate them without disadvantaging the represented party, for example how far does one give them advice without compromising one’s independence as the adjudicator? It is a very difficult situation.”). See also Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423–87 (2007) (quoting the *Martinez v. Court of Appeals* case that there is “no empirical research ... that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness.” See *Martinez v. Court of Appeals*, 528 U.S. 152, 164 (2000) (Breyer, J., concurring)).
- 15 For committee reports and studies, see *Standing Committee on the Delivery of Legal Services*, AMERICAN BAR ASSOCIATION (12 July 2011), <http://www.abanet.org/legalservices/delivery/delunbund.html>
- 16 AIKMAN, ART AND PRACTICE OF COURT ADMINISTRATION 383.
- 17 AIKMAN, ART AND PRACTICE OF COURT ADMINISTRATION 385.



- 18 CANADIAN BAR ASSOCIATION, SYSTEMS OF CIVIL JUSTICE TASK FORCE REPORT, at VI, 54–55 (1996) (Recommendation 28), [http://www.cba.org/CBA/pubs/pdf/systemscivil\\_tfreport.pdf](http://www.cba.org/CBA/pubs/pdf/systemscivil_tfreport.pdf). See also LAW SOCIETY OF BRITISH COLUMBIA, REPORT OF THE UNBUNDLING OF LEGAL SERVICES TASK FORCE LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE 8 (4 Apr. 2008), [http://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers\\_2008.pdf](http://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers_2008.pdf) (Recommendation 11) (“In order to facilitate the delivery of limited scope legal services, new court rules and court forms, drafted in plain and concise language, are required to allow a lawyer providing limited scope legal services to go on and off the record in an expedited manner, thereby communicating the scope of that lawyer’s involvement to the court, the court registry and interested parties.”).
- 19 See, e.g., *Pros. v. Krajišnik* (5), Decision on Krajišnik’s Request to Self-Represent (11 May 2007). See also *Pros. v. Krajišnik* (6), Dissenting Opinion of on Right to Self-Representation (11 May 2007); *Pros. v. Šešelj* (4), Decision on Appeal against Trial Chamber’s Decision on Assignment of Counsel (20 Oct. 2006); *Pros. v. Šešelj* (5), Decision on Appeal against Trial Chamber’s Decision on Assignment of Counsel (8 Dec. 2006).
- 20 HUM. RTS. WATCH, WEIGHING THE EVIDENCE 69, n. 273.
- 21 *Pros. v. Milošević* (22), Order Inviting Designation of *Amicus Curiae* (30 Aug. 2001); *Pros. v. Milošević* (36) Trial Tr. 15-8 (30 Aug. 2001).
- 22 *Milošević case* (78), Office of the Prosecutor on Future Conduct of Case in Light of the State of the Accused’s Health ¶ 18 (8 Nov. 2002).
- 23 *Milošević case* (41), Oral Ruling of Trial Chamber, Trial Tr. 14574 (18 Dec. 2002) (the Trial Chamber ruling “Defense Counsel will not be imposed upon the Accused against his wishes in the present circumstances. It is not normally appropriate in adversarial proceedings such as these. The Trial Chamber will keep the position under review.”). The reasons were officially filed on 4 April 2002.
- 24 See BOAS, MILOŠEVIĆ TRIAL 53 (“... the right to self-representation in the conduct of a defense in a complex international criminal law trial [has] a significant impact on the fair and expeditious trial paradigm, and therefore upon how to achieve best practice in such trials.”).

- 25 See Scharf, *Self Representation versus Assignment of Defense Counsel before International Criminal Tribunals*, 4 INT'L CRIM. JUST. 31, 31–46 (2006).
- 26 *Milošević case* (52), Order to an *Amicus* to Prepare Written Submissions (11 Dec. 2002) (issuing an order requesting written submission from Timothy McCormack, as *Amicus*, regarding international law issues related to self-defense in the Kosovo portion of the indictment).
- 27 *Milošević case* (46), Order Inviting Designation of *Amicus Curiae* (23 Nov. 2001).
- 28 *Pros. v. Milošević*, (22), Order Inviting Designation of *Amicus Curiae* (30 Aug. 2001). See also *Pros. v. Milošević* (18), Initial Appearance, Written Note by Milošević filed (3 July 2001). At the Initial Appearance, also held on 3 July 2001, Milošević informed the Judges that he would represent his self, *Pros. v. Milošević* (16), Initial Appearance Tr. 1-2 (3 July 2001).
- 29 See *Pros. v. Blaskić* (2), Order Submitting Matter to Trial Chamber II (14 Mar. 1997) (discussing the power of the Chamber to issue subpoena duces tecum); *Pros. v. Brjđanin* (3), IT-99-36-AR.73.9, Decision on Interlocutory Appeal (11 Dec. 2002) (discussing journalistic privilege).
- 30 See ICTY, R. P. & EVID. 44, IT/32/Rev. 22 (28 Dec. 2001). Waters also discusses the structurally ambiguous loyalties of the *Amici*, at 30203; Del Ponte at 146, takes a different view.
- 31 *Milošević case* (8), Provision of Adequate Facilities to Allow Accused to Defend Himself ¶ 6 (5 Mar. 2002) (“In the present case, however, the accused does not wish to be represented by counsel as a consequence of his position not to recognise the Tribunal. The accused’s choice to defend himself cannot affect his inalienable right to a fair trial. The Trial Chamber is under the obligation of Article 20 of the Statute to ensure a fair trial for the accused, independent of the position the accused adopts. The right to a fair trial cannot be waived.”)
- 32 *Milošević case* (8), Provision of Adequate Facilities to Allow Accused to Defend Himself (5 Mar. 2002).
- 33 *Milošević case* (74), Registry Report on Facilities (18 Mar. 2002).

- 34 *Milošević case* (74), Registry Report on Facilities.
- 35 *Milošević case* (74), Registry Report on Facilities (“The accused, during the orientation phase which began on 1 July and ended on 31 August 2001, personally met with two attorneys and two law professors for the total time of 14.5 hours. These specific meetings took place from 30 July to 22 August 2001[.]” The Registry refused any further face-to-face visits at the UNDU in line with the standard policy. Milošević was permitted further telephone communication with these individuals, and “...the accused [also] received regular visits from Mr. Nico Steijnen, Zeist, and Mr. Jacques Verges, Paris, regarding his application against the Netherlands before the European Court of Human Rights concerning his deprivation of liberty by detention at the Tribunal.”).
- 36 See ICTY, R. GOVERNING THE DET. OF PERS. AWAITING TRIAL OR APP. BEFORE THE TRIB. OR OTHERWISE DETAINED ON THE AUTH. OF THE TRIB. 65, IT38/Rev. 9, 21 July 2005.
- 37 See *Milošević case* (40), Motion Hearing, Trial Tr. 116, (11 Dec. 2001) where the Accused states, “I have been informed in the meantime that without my request, you have assigned certain advice that I did not ask for, interpreting my agreement to receive visits by certain individuals as a request for legal advice. My response to that has been addressed to the Registry that I do not consider that whoever visits me and has a law degree should be appointed as my legal counsel, and I don’t think it would be permissible for visits to continue to be restricted, visits by persons who wish to visit me in accordance with the Rules that you have established and on a nondiscriminatory basis, since other people in that prison are allowed such visits.”
- 38 The Legal Associates maintained their offices in an apartment in The Hague. See Simons, *The Hand That Feeds Milošević’s Defense*, N.Y. TIMES, 10 Nov. 2002.
- 39 Milošević’s Legal Associates would eventually make the same argument. See Simons, *The Hand That Feeds* (“He continued the tour, past binders and unsorted boxes. ‘This is what 150,000 documents look like,’ Mr. Tomanović said. ‘I have calculated that if Mr. Milosevic or I read every page just once, at two minutes per page, it will take more than a year.’ Besides, he added, their classification is immensely complicated. ‘We have not managed to figure out the system.’”).



- 40 *Milošević case* (44), Order Concerning Preparation and Presentation of Defence Case (17 Sept. 2003) [September Order].
- 41 *Milošević case* (44), September Order.
- 42 *Milošević case* (44), September Order.
- 43 *Milošević case* (44), September Order.
- 44 *Milošević case* (18), Decision on Notification of Completion of Prosecution Case (25 Feb. 2004).
- 45 *See Milošević case* (42), Order Appointing New Presiding Judge (Feb. 26, 2004) (Appointing Judge Robinson as Presiding Judge of Trial Chamber III and the *Milošević case*). Judge May's resignation due to health reasons was effective 1 June 2004. Judge Bonomy was later appointed to replace Judge May. *See Milošević case* (51), Order Replacing a Judge in a Case (10 June 2004).
- 46 *Milošević case* (44), September Order (17 Sept. 2003); *Milošević case* (37), Scheduling Order on Defence Case, 2-4 (12 Feb. 2004). *See* ICTY, R.P. & EVID. 65*ter* (G)(i), IT/32/Rev. 22 (28 Dec. 2001). The mode of testimony was also required; however, Milošević chose to call all of the defense witnesses viva voce.
- 47 *Milošević case* (37), Scheduling Order on Defence Case, 2-4 (12 Feb. 2004). *See* ICTY, R. P. & EVID. 65*ter* (G)(ii), IT/32/Rev. 22 (28 Dec. 2001).
- 48 Internal Registry Protocol, titled *Proposed Protocol to Be Used by the Pro Se Liaison Officer during the Preparation and Presentation of the Case, the Prosecutor v. Slobodan Milošević*.
- 49 AIKMAN, ART AND PRACTICE OF COURT ADMINISTRATION 383 ("Until 1995, self-represented litigants ... were on their own. The feeling was that if they wanted to represent themselves that was their right, but the court could not help them because that would be favoring one side over the other and be contrary to the appearance of justice. Courts felt they just had to put up with self-representeds' lack of knowledge of applicable law and what law is not applicable, incomplete and incorrect paperwork, and lack of supporting evidence when they got to trial.").
- 50 *Milošević case* (50), Order on the Modalities (3 Sept. 2004). The Chamber instructed the Registry to secure the appointment of Stephen Kay and Gillian Higgins as Court Assigned Counsel. *See also*



- Milošević case* (17), Decision on Motions of the Defence in *Pros. v. Milutinovic, Ojdanic and Sainovic*, Trial Tr. 32831-94 (15 Sept. 2004).
- 51 *See Milošević case* (17), Decision on Motions of the Defence in *Pros. v. Milutinovic, Ojdanic and Sainovic*, Trial Tr. 32831-94 (Sept. 15, 2004).
- 52 *See Milošević case* (17), Decision on Motions of the Defence in *Pros. v. Milutinovic, Ojdanic and Sainovic* Trial Tr. 32884 (15 Sept. 2004) (Milošević states, “[a]ll this can be obtained from the liaison officer. The liaison officer can communicate with my associates and receive every piece of information that the Registry may be interested in.”). This material was received and then disclosed to the Assigned Counsel and the Prosecution, where specifically permitted by Milošević.
- 53 *Pros. v. Janković & Stanković*, Decision of Stanković’s Request for Self-Representation (19 Aug. 2005). The Trial Chamber rejected Stanković’s request to represent himself. The Trial Chamber argued that the right is not unqualified and examined whether circumstances existed allowing the Chamber to insist on representation. The Chamber made reference to obstructionist behavior already exhibited in court and through filings. It concluded that the mere threat of revealing the identities of protection witnesses was enough for the Chamber to disallow the accused’s right to waive legal representation.
- 54 *See Pros. v. Karadžić* (4), Order on Procedure for Conduct of Trial ¶ T (8 Oct. 2009) (“During trial, the Accused’s legal advisor, Mr. Peter Robinson, is permitted to be present in the courtroom and will have a right of audience limited to addressing the Trial Chamber on legal issues that arise during the proceedings.”). The Accused is required to request the Chamber for such a right of audience when necessary.
- 55 *Pros. v. Krajišnik* (1), Decision on Krajišnik’s Request ¶ 40 (11 Sept. 2007).
- 56 *Pros. v. Krajišnik* (1), IT-00-39-A, Decision on Krajišnik’s Request ¶ 40 (11 Sept. 2007).
- 57 Remuneration Scheme for Person Assisting Indigent Self-Represented Accused, 24 July 2009 (rev.1). [Remuneration Scheme].
- 58 *Pros. v. Karadžić* (2), Decision on Accused Motion for Adequate Facilities and Equality of Arms (28 Jan. 2009).

- 59 See Remuneration Scheme, ¶ 5.1, *and compare with* Directive on Assignment of Counsel, Directive No. 1/94, Art. 14 (to include persons who have advanced university degrees in law and sufficient relevant work experience in law) [Directive].
- 60 CODE OF PROF'L CONDUCT FOR DEFENCE COUNSEL APPEARING BEFORE THE INT'L TRIB., IT/125; Directive on Assignment of Counsel, Directive No. 1/94.
- 61 See, e.g., *Milošević case* (43), Order Appointing Rakić as Legal Associate, 3 (23 Oct. 2003).
- 62 See *Pros. v. Karadžić* (5), Registrar's Submission on Access by Accused's Defense Team to Confidential Information (23 Feb. 2009); See also *Pros. v. Karadžić* (3), Decision on Protective Measures for Witnesses ¶ 34 (30 Oct. 2008) (setting out the conditions expected for disclosing confidential material to third parties).
- 63 See, e.g., Special Trib. Leb., R. P. & EVID. 57 ("The Head of Defence Office shall provide: (i) upon the request of counsel or *proprio motu*, adequate assistance and support to assigned counsel and their staff, including, where appropriate, legal research and memoranda and other advice as deemed necessary; (ii) *adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case....*") (emphasis added).

## CHAPTER 12

- 1 Stat. ICTY, Art. 21(4)(d); ICTY, R. P. & EVID., IT/32 R.45(e) (11 Feb. 1994).
- 2 As Anoya notes, such a fourth pillar exists under the Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, UN Doc. S/RES/1757, Art. 13 (30 May 2007). A similar approach has also been taken by the hybrid Sierra Leone and Cambodia Courts. Special Trib. Leb., R. P. & EVID., R.45 (as amended 14 May 2005); Internal R. of the Extraordinary Chambers in the Courts of Cambodia, R.11 (12 June 2007).
- 3 See, e.g., SCHABAS, UN INTERNATIONAL CRIMINAL TRIBUNALS 47ff; Sandholtz, "Creating Authority by the Council: The International Criminal Tribunals," *in* UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 132 (Cronin & Hurd eds.). See generally

- Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107 (2009).
- 4 See, e.g., Walker, *When a Good Idea Is Poorly Implemented: How the ICC Fails to Be Insulated from International Politics*, 106 W. VA. L. REV. 245 (2004).
  - 5 See, e.g., Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 445–46 (2008); Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 521 (2003).
  - 6 See, e.g., Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 841–42 (1997); McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 727 (1997).
  - 7 International Covenant on Civil and Political Rights, Art. 14(3)(d), 16 Dec. 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(c), 4 Nov. 1950, E.T.S. 5. These instruments do not bar courts from refusing self-representation under certain circumstances. See, e.g., *Kremzow v. Austria*, no. 268-B, Eur. Ct. H.R. Series A ¶¶ 57–59 (21 Sept. 1993). There is also a body of national case law limiting the right of self-representation in certain cases. See, e.g., *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). For a discussion of *Faretta*, see Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 GEO. J. INT'L L. 919 (2009).
  - 8 KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 44. Many civil law systems do not provide for self-representation, but the right is increasingly recognized in Europe.
  - 9 See, e.g., Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U.L. REV. 1147, 1169 (2010).
  - 10 See, e.g., *Illinois v. Washington*, 665 N.E.2d 1330, 1336 (1996) (“Imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process.”).
  - 11 See, e.g., Megret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. INT'L L. & FOR. AFF. 37, 56 (2009).

- 12 See, e.g., Wladimiroff, *The Trial Process: Prosecution, Defense and Investigation: Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949, 966 (2005).
- 13 See, e.g., Scharf, *Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense*, WASH. POST, 29 Aug. 2004.
- 14 See, e.g., *Milošević v. The Netherlands*, Eur. Ct. H.R., Decision as to the Admissibility of Application no. 77631/01 by Slobodan Milošević against the Netherlands (19 Mar. 2002).
- 15 ARMATTA, TWILIGHT OF IMPUNITY 34.
- 16 Tuinstra, *Assisting an Accused to Represent Himself: Appointment of Amici Curiae as the Most Appropriate Option*, 4 J. INT'L CRIM. JUST. 47, 52–53 (2006).
- 17 The original decision by the Trial Chamber was later partly reversed by the Appeals Chamber. *Milošević case* (7), Appeals Chamber Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 Nov. 2004).
- 18 See, e.g., Milanović, *In the Interests of Justice?: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947 (2005); Damaška, *Assignment of Counsel and Perceptions of Fairness*, 3 J. INT'L CRIM. JUST. 3 (2005); Sluiter, *Fairness and the Interests of Justice: Illusive Concepts at the Milošević Trial*, 3 J. INT'L CRIM. JUST. 9 (2005); Jørgensen, *Problem of Self-Representation at International Criminal Tribunals: Striking a Balance between Fairness and Effectiveness*, 4 J. INT'L CRIM. JUST. 64 (2006). But see Scharf, *Self-Representation versus Assignment of Defense Counsel before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31 (2006). For a discussion of alternative causes of delays in the trial process, see Williams, "The Completion Strategy of the ICTY and the ICTR," in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 153, 232 (Bohlander ed.).
- 19 See Anoya at 166-67.
- 20 *Pros. v. Krajišnik* (3), IT-00-39-A, Appeals Chamber Decision on Krajišnik's Request (11 Sept. 2007).
- 21 See, e.g., DEL PONTE, MADAME PROSECUTOR 142.
- 22 See, e.g., BOAS, MILOSEVIC TRIAL 79.



- 23 For a discussion, see McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139, 141–42 (2007); Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 701–03 (2010).
- 24 See, e.g., Code of Professional Conduct for Counsel, ICC Doc. ICC-ASP/4/Res.1, Art. 16(1) (12 Feb. 2005) (“Counsel shall put the client’s interests before counsel’s own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.”). Even under these rules, prosecution and defense staff have certain obligations to the court, and this is true at the ICTY as well.
- 25 See, e.g., Tuinstra, *Assisting an Accused to Represent Himself* 54 (“An amicus curiae’s essential function is being a friend of the court, not of the accused.”).
- 26 Ellis, *Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 519–20 (1997).
- 27 Cf. Trachtman, “Summary,” in EFFICIENCY, EQUITY, LEGITIMACY: MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 351 (Porter et al. eds.).

## CHAPTER 13

- 1 Two recent studies, for example, give some data and reactions of Bosniaks to the ICTY and the *Milošević* trial, but this is not the main focus of their project. See NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL’S IMPACT*; ORENTLICHER, *THAT SOMEONE GUILTY BE PUNISHED*.
- 2 See Miller, *Fight for Justice in Bosnia Goes On*, GUARDIAN, 16 Aug. 2010; McMahon & Western, *Death of Dayton*, 88 FOREIGN AFF. 69 (2009) (summarizing contemporary Bosnian political crises); PEACE WITHOUT POLITICS?: TEN YEARS OF INTERNATIONAL STATE-BUILDING IN BOSNIA (Chandler ed.) (examining contemporary Bosnian politics relating to reform, refugee returns, institutional design, and the role of the international community).
- 3 Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271, 288 (2005).

- 4 Telephone Interview with prominent Bosnian reporter, Sarajevo (4 Aug. 2010).
- 5 See, e.g., FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS (a concise overview of the debate on peace versus justice in transitional justice); MY NEIGHBOR, MY ENEMY (Stover & Weinstein eds.) (reporting survey research on the effects of trials upon social reconciliation, and finding a tenuous relationship between the two); TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY (Roht-Arriaza & Mariezcurrena eds.) (giving a detailed discussion of transitional justice debates).
- 6 See, e.g., BURG & SHOUP, WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION (general factual account of historical framework, the war, and international involvement); HONIG & BOTH, SREBRENICA: RECORD OF A WAR CRIME; FRIEDMAN, BOSNIAN MUSLIMS: DENIAL OF A NATION (giving a history of Bosnian Muslims with discussion of their perspectives leading up to and during the war). See also RAMET, THINKING ABOUT YUGOSLAVIA: SCHOLARLY DEBATES ABOUT THE YUGOSLAV BREAKUP (reviewing competing arguments about the war, postwar period, and others aspects of the former Yugoslavia).
- 7 See MUJKIĆ, WE, THE CITIZENS OF ETHNOPOLIS (examining the dominance of the ethno-national principle over the civic in postwar Bosnia); BOSE, BOSNIA AFTER DAYTON: NATIONALIST PARTITION AND INTERNATIONAL INTERVENTION (examining the complexity of state-building and democratization in partitioned states such as Bosnia). Bose, *Bosnian State a Decade after Dayton*, 12 INT'L PEACEKEEPING 322 (2005) (arguing that Dayton is the most feasible and democratic framework for Bosnia despite its flaws, and that international intervention has done more good than harm); PEACEBUILDING AND CIVIL SOCIETY IN BOSNIA-HERZEGOVINA: TEN YEARS AFTER DAYTON (Fischer ed.).
- 8 Surveys to be discussed in this section come from the following sources: NETTELFIELD, COURTING DEMOCRACY chs. 5, 7; CIBELLI & GUBEREK, JUSTICE UNKNOWN, JUSTICE UNSATISFIED?: BOSNIAN NGOS SPEAK ABOUT THE ICTY; KOSTIC, AMBIVALENT PEACE: EXTERNAL PEACEBUILDING, THREATENED IDENTITY AND RECONCILIATION IN BOSNIA-HERZEGOVINA, International IDEA, *South East Europe (SEE) Public*

*Agenda Survey* (4 Apr. 2002),  
[http://archive.idea.int/press/documents/SEE\\_Survey\\_Press\\_Release\\_English.pdf](http://archive.idea.int/press/documents/SEE_Survey_Press_Release_English.pdf) [*Public Agenda Survey*].

- 9 Only four percent of respondents in the RS trusted the ICTY, compared to 51 percent in the Bosniak-Croat Federation. *Public Agenda Survey* 4.
- 10 In the Federation, a strong majority of NGO respondents found the ICTY to be a credible institution (78 percent in 1999 and 88 percent in 2004), while in the RS, 17 percent agreed with the statement in 1999 and 65 percent in 2004. This data shows that an important change happened among Bosnian Serbs during this five-year period that made them less inclined to see the ICTY as biased and illegitimate. Survey data from NETTELFIELD, *COURTING DEMOCRACY* ch. 5 (2004 data); Figures from 1999 from CIBELLI & GUBEREK, *JUSTICE UNKNOWN, JUSTICE UNSATISFIED?*. Furthermore, about three-quarters of respondents said in 2004 that the ICTY somewhat contributed to the return of refugees, compared to 33 percent who agreed with this statement in 1999.
- 11 80 percent of Bosniaks, compared to 16 percent of Serbs. KOSTIC, *AMBIVALENT PEACE* 323.
- 12 67.9 percent of Bosniaks compared to 43.2 percent for Croats and 13.5 percent for Serbs. KOSTIC, *AMBIVALENT PEACE* 323.
- 13 32.1 percent compared to 49.2 percent for Croats and 79.2 percent for Serbs. KOSTIC, *AMBIVALENT PEACE* 323.
- 14 97.2 percent of Bosniaks viewed Milošević as “very negative,” compared to 64.2 percent of Serbs. KOSTIC, *AMBIVALENT PEACE* 325.
- 15 Telephone Interview with Munira Subašić, *Mothers of the Enclaves of Srebrenica and Žepa* (13 Dec. 2010).
- 16 See, e.g., Telephone Interview with Bosnian-American psychologist (21 July 2010); Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010); Telephone Interview with Munira Subašić, *Mothers of the Enclaves of Srebrenica and Žepa* (13 Dec. 2010); Personal Communication with Asim Mujkić, University of Sarajevo (22 July 2010).
- 17 NETTELFIELD, *COURTING DEMOCRACY* 152–60. Bachmann and Armatta discuss the role of the media and outreach. Compare Krasniqi and Trix,



who address the treatment of the *Milošević* trial in Kosovar media.

- 18 NETTELFIELD, *COURTING DEMOCRACY* ch. 5.
- 19 See, e.g., MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE* (evaluating different mechanisms of transitional justice and stressing the importance of nonlegal remedies); *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY* (supporting a contextual approach to transitional justice); MY NEIGHBOR, MY ENEMY; TEITEL, *TRANSITIONAL JUSTICE* (supporting a constructivist approach to how law can structure a transition).
- 20 See CARR, *TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (arguing for the weakness of international law in the face of power politics); ARMSTRONG, FARRELL & LAMBERT, *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS*, ch. 3 (summarizing the theories of international relations and international law). See also SUBOTIĆ, *HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS* (examining the domestic effects of the ICTY on justice in the Balkans and taking a more pessimistic and “realist” view).
- 21 See RISSE-KAPPEN, ROPP & SIKKINK, *POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (illustrating the constructivist approach in international relations by examining the role of transnational and domestic actors in the human rights norm socialization process in numerous countries); LAMONT, *INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE* (using a constructivist approach to examine regional compliance with ICTY); NETTELFIELD, *COURTING DEMOCRACY* (finding constructivism a useful approach to explain norm changes related to the ICTY in Bosnia).
- 22 See MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 5 (suggesting that closure for victims of mass atrocities may be impossible); Telephone Interview with Bosnian-American psychologist (13 July 2010).
- 23 This view was suggested by numerous informants. See, e.g., Telephone Interview with Dina Duraković, Bosnian lawyer (22 July 2010); Personal Communication with Bosnian-American psychology professor (16 Aug. 2010).
- 24 See, in particular, Kostovicova and Trix on this issue in the context of Serb-Kosovar relations. These types of collective stories or narratives of repeated suffering can be seen as “symbolic strategies that



powerfully narrativize the experience of the social category to which the individual belongs, rather than telling the particular individual's story." Selimović, *Narrations of Truth and Justice: Local Responses to the ICTY in Bosnia-Herzegovina*, at 8 (presented at 2009 International Studies Association convention, New York).

- 25 Telephone Interview with Munira Subašić, president of the Mothers of the Enclaves of Srebrenica and Žepa (13 Dec. 2010).
- 26 This view was expressed by Nijaz Duraković, University of Sarajevo. *Dosje Milošević*, DNEVNI AVAZ, 12 Mar. 2006.
- 27 Numerous interlocutors repeated this point. *See, e.g.*, Telephone Interview with Dina Duraković, Bosnian lawyer (22 July 2010) (stating this in reference to attitudes of many different Bosnians at the time).
- 28 *See, e.g.*, ARMATTA, TWILIGHT OF IMPUNITY 7, 21, 144 (examining Milošević's tactics and his use of the courtroom to advance his political agenda).
- 29 Berić, *Smrt ne ponistava krivicu [Death does not erase guilt]*, OSLOBODJENJE. 12 Mar. 2006, <http://nwbih.com/news.cgi?ref1=293>.
- 30 Many interlocutors noted this; *see also* ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED 76.
- 31 Telephone Interview with Munira Subašić, Mothers of the Enclaves of Srebrenica and Žepa (13 Dec. 2010). Compare Trix's discussion of Kosovar witnesses, at 245–46.
- 32 ARMATTA, TWILIGHT OF IMPUNITY 144. *See* Trix at 236, 242; Surroi at 226–27.
- 33 Telephone Interview with Enver Redžanović, former ArBiH (3 Jan. 2011).
- 34 Personal Communication with Asim Mujkić, University of Sarajevo (22 July 2010). Many interlocutors mentioned the Tribunal's failure to release Serbia's VSO documents to the ICJ as an example of efforts to mollify Serbia at the cost of sacrificing or sabotaging Bosniaks' interests. *See* discussion below.
- 35 Telephone Interview with Lecturer in the Faculty of Islamic Studies, University of Sarajevo (26 Aug. 2010).
- 36 *Dosje Milošević*, DNEVNI AVAZ, 12 Mar. 2006 (Statement by Hajra Catić of Žene Srebrenice).

- 37 Interview with Eldin Hadžović, *BH Dani* (recounting the headlines from *Dnevni Avaz* on the day Milošević died).
- 38 Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).
- 39 Anger was a sentiment very frequently mentioned. *See, e.g.*, Telephone Interviews with: Munira Subašić (13 Dec. 2010); Eldin Hadzovic (13 Aug. 2010); Bosnian-American psychologist (21 July 2010); a lecturer at the Faculty of Islamic Studies (26 Aug. 2010).
- 40 Telephone Interview with Dina Duraković, Bosnian lawyer (22 July 2010) (describing the flurry of discussion and public debate following the news of Milošević's death).
- 41 Samir Sestan, *Gott ist Tot*, START, 21 Mar. 2006.
- 42 Halilović, *Moji haški susreti sa Miloševićem* [*My Hague Encounters with Milošević*], BH DANI, 17 Mar. 2006. Halilović was a commanding officer in the ArBIH who was indicted by the ICTY for war crimes, but acquitted. *Pros. v. Halilović*, IT-01-48, Appeals Judgement (16 Oct. 2007).
- 43 *Sopštenje Vijeće Kongresa Bošnjačkih Intelektualaca* [*Report by the Council of the Congress of Bosniak Intellectuals*], DNEVNI AVAZ, 18 Mar. 2006.
- 44 *Sopštenje Vijeće Kongresa Bošnjačkih Intelektualaca* [*Report by the Council of the Congress of Bosniak Intellectuals*], DNEVNI AVAZ, 18 Mar. 2006.
- 45 Telephone Interview with Munira Subašić, Mothers of the Enclaves of Srebrenica and Žepa (13 Dec. 2010). Also stated in *Reakcije u BiH na vijest o smrti Miloševića*, [*Reaction in Bosnia to the death of Milošević*], NEZAVISNE NOVINE, 12 Mar. 2006.
- 46 Telephone Interview with prominent Bosnian reporter in Sarajevo (4 Aug. 2010).
- 47 *Claims of Poisoning Raise Stakes of Milošević Autopsy*, RFE/RL, 11 Mar. 2006, <http://www.rferl.org/content/article/1066618.html>.
- 48 Telephone Interview with American diplomat serving in Bosnia (2006–2009) (11 Aug. 2010).
- 49 Telephone Interview with Dragan Golubović, Media Center, Sarajevo (28 Oct. 2010); Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).

- 50 Telephone Interview with Dragan Golubović, Media Center Sarajevo (28 Oct. 2010).
- 51 Telephone Interview with Dragan Golubović, Media Center Sarajevo (28 Oct. 2010).
- 52 *Milošević case* (1) 98bis Decision (16 June 2004).
- 53 Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).
- 54 Telephone Interview with Bosnian-American psychology professor (21 July 2010); Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010); Telephone Interview with Dina Duraković, Bosnian lawyer (22 July 2010). *See also* Kolar, *Vozd Umro, (ne)djela žive [Leader died—crimes live on]*, OSLOBODJENE, 13 Mar. 2006.
- 55 KYMLICKA, MULTICULTURAL CITIZENSHIP (presenting a liberal theory of minority rights or group rights that focuses on the importance of one's group identity and societal culture for feelings of security and dignity).
- 56 Selimović, *Narrations of Truth and Justice* 8–9.
- 57 ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED 74.
- 58 Personal Communication with Nerzuk Ćurak, University of Sarajevo (30 Aug. 2010).
- 59 Telephone Interview with Bosnian-American psychologist (21 July 2010).
- 60 Telephone Interview with Enver Redžanović, former ArBiH (3 Jan. 2011).
- 61 Personal Communication with Merima Husejnović, BIRN (Balkan Investigative Reporting Network, Sarajevo) (4 Aug. 2010).
- 62 *Pros. v. Popović et al.* (2), IT-05-88-T, Sentencing Judgement (10 June 2010). On the significance of these cases for establishing justice in Bosnia, *see* Drakulić, *Truth Is Justice for Srebrenica*, GUARDIAN, 10 June 2010.
- 63 ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED 43.
- 64 Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).
- 65 Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).
- 66 Swimelar, *Visual Culture and Pedagogy: Teaching Human Rights with Film and Images*, 3 GLOBAL-E: A GLOBAL STU. J. (2009).
- 67 Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010). Prosecutor Geoffrey Nice also stated that this particular video had a huge impact on public opinion, although he does not specify which

- public specifically. See interview with Sir Geoffrey Nice in Ivana Miloradović, *There Was Pressure on Our Work*, NIN (15 May 2008). See also Nice's interview with Edina Bećirević, DANI (30 Oct. 2009).
- 68 Examples are learning the truth about missing relatives, receiving apologies from neighbors, putting someone in prison, seeking revenge, testifying at a trial, being able to forget the past and move on, returning to one's home, and having a job and income. MY NEIGHBOR, MY ENEMY 4.
  - 69 MY NEIGHBOR, MY ENEMY 115. This study involved in-depth interviews with 87 ICTY witnesses, 62 of whom were Bosniaks.
  - 70 See STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (arguing that we should not assume that testifying is only positive and helps victims move forward).
  - 71 Telephone Interview with Bosnian-American psychologist (21 July 2010).
  - 72 Personal Communication with Nerzuk Ćurak, University of Sarajevo (30 Aug. 2010).
  - 73 Telephone Interview with Munira Subašić, Mothers of the Enclaves of Srebrenica and Žepa (13 Dec. 2010).
  - 74 Telephone Interview with Munira Subašić, Mothers of the Enclaves of Srebrenica and Žepa (13 Dec. 2010).
  - 75 Personal Communication with Bosnian-American psychologist (16 Aug. 2010).
  - 76 MY NEIGHBOR, MY ENEMY 104.
  - 77 Personal Communication with Nerzuk Ćurak, University of Sarajevo (30 Aug. 2010).
  - 78 Personal Communication with Nerzuk Ćurak, University of Sarajevo (30 Aug. 2010).
  - 79 Personal Communication with Asim Mujkić, University of Sarajevo (22 July 2010). See MUJKIĆ, *WE, THE CITIZENS OF ETHNOPOLIS* (examining Bosnia's postwar nationalism and prioritization of the ethnic principle over the civic principle).
  - 80 Personal Communication with Asim Mujkić, University of Sarajevo (22 July 2010).
  - 81 *Dosje Milošević*, DNEVNI AVAZ, 12 Mar. 2006.
  - 82 Amanpour, *Interview Haris Silajdžić*, CNN.COM, 1 Mar. 2010.



- 83 Personal Communication with Tanja Topić, Friedrich Ebert Foundation, Banja Luka (26 Aug. 2010).
- 84 Thanks to Sarah Wagner, an anthropologist who has done extensive field work in Eastern Bosnia with victims' groups and family associations, for this point. *See also* WAGNER, TO KNOW WHERE HE LIES: DNA TECHNOLOGY AND THE SEARCH FOR SREBRENICA'S MISSING.
- 85 The RS's 2004 report taking responsibility for Srebrenica was mandated by OHR and the Human Rights Chamber and adopted under pressure. *See* U.S. DEP. OF STATE, HUM. RTS. REPORT FOR BOSNIA-HERZEGOVINA, <http://www.state.gov/g/drl/rls/hrrpt/2004/41673.htm>; *Srebrenica was not genocide: Bosnian Serb Leader*, FRANCE 24 INT'L NEWS (27 Apr. 2010) (Milorad Dodik, Interview with *Vecernje Novosti*), Dodik's later statements call into question this acceptance of responsibility. *See* Stanimirović, *Apology for Srebrenica*, TRANSITIONS ONLINE (18 Nov. 2004); *Srebrenica Was Not Genocide: Bosnian Serb Leader*, FRANCE 24 INT'L NEWS (27 Apr. 2010) (Milorad Dodik, Interview with *Vecernje Novosti*).
- 86 ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED 96.
- 87 ICJ, *Bosnian Genocide (Bosn. & Herz. v. Serb. & Mont.)*, ¶¶ 377–415 (26 Feb. 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf>.
- 88 Telephone Interview with Jelena Subotić, Georgia State University (19 Aug. 2010).
- 89 *Dosje Milošević*, DNEVNI AVAZ, 12 Mar. 2006.
- 90 *See* DEL PONTE & SUDETIĆ, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS 202–03; ARMATTA, TWILIGHT OF IMPUNITY 315–16; Institute for War and Peace Reporting (IWPR), *How Belgrade Escaped Genocide Charge* (2 May 2008), <http://iwpr.net/report-news/how-belgrade-escaped-genocide-charge>.
- 91 Hartmann, *Vital Genocide Documents Concealed*, BOSNIA INSTITUTE (21 Jan. 2008), [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2341](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2341). *See also* International Relations and Security Network, *Bosnia v. Serbia: The Evidence Scandal* (24 Apr. 2007), <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=53188&lng=en>, According to Prof. William Schabas, because the ICJ is a civil rather than a criminal court. It is not used to aggressively pursuing evidence; instead it relies more on material put forth before

- it. Marlise Simons, *Genocide Court Ruled for Serbia without Seeing Full War Archive*, N.Y. TIMES, 9 Apr. 2007.
- 92 Kolona ka Potočarima, B92, 9 July 2007, [http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=07&dd=09&nav\\_category=64&nav\\_id=254499&version=print](http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=07&dd=09&nav_category=64&nav_id=254499&version=print).
- 93 Telephone Interview with Dragan Golubović, Media Center, Sarajevo (28 Oct. 2010).
- 94 Baroni, *ICTY and Its Mission to Restore Peace*, 12 PACE INT'L L. REV. 233 (2000).
- 95 Jelena Subotić said the ICJ case supported the collective narrative of the war that people already had—that “Serbs kill Bosniaks.” Telephone Interview with Jelena Subotić, Georgia State University (19 Aug. 2010).
- 96 Telephone Interview with Jelena Subotić, Georgia State University (19 Aug. 2010).
- 97 Biserko & Becirevic, *Denial of Genocide—On the Possibility of Normalising Relations in the Region*, BOSNIAN INSTITUTE (23 Oct. 2009), [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2638](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2638).
- 98 Personal Communication with Nerzuk Ćurak, University of Sarajevo (30 Aug. 2010) (e-mail on file with author); Personal Communication with Asim Mujkić, University of Sarajevo (22 July 2010); Telephone Interview with Bosnian-American psychologist (21 July 2010); Telephone Interview with lecturer in the Faculty of Islamic Studies, University of Sarajevo (26 Aug. 2010). This point is also supported by the author’s fieldwork in Bosnia in 2006–2007.
- 99 NETTELFIELD, COURTING DEMOCRACY; Meernik, *Justice and Peace?* 271–89.
- 100 McMahon & Forsythe, *ICTY’s Impact on Serbia: Judicial Romanticism Meets Network Politics*, 30 HUM. RTS. Q. 412 (2008).
- 101 Kerr, *Road from Dayton to Brussels? ICTY and the Politics of War Crimes in Bosnia*, 14 EUR. SECURITY 319, 331 (2005).
- 102 Telephone Interview with Lecturer in the Faculty of Islamic Studies, University of Sarajevo (26 Aug. 2010).

## CHAPTER 14

- 1 For a concise review of evaluative transitional justice literature, see Thoms, Ron & Paris, *State-Level Effects of Transitional Justice*, 4 INT'L J. OF TRANSITIONAL JUST. 329 (2010); ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH (van der Merwe, Baxter & Chapman eds.). In relation to Bosnia, see ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA.
- 2 Recent studies include NETTLEFIELD, COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT; SUBOTIĆ, HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS; Klarin, *Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89 (2009). In relation to Milošević, see in particular Scharf, *Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915 (2003).
- 3 For example, compare Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001), PROSECUTING HEADS OF STATE (Lutz & Reiger eds.), and SUBOTIĆ, HIJACKED JUSTICE.
- 4 For a brief overview of these competing causal claims, see Thoms, Ron & Paris, *State-Level Effects* 333–34. The term “hijacked justice” describes how local elites used transitional justice mechanisms to pursue unrelated goals, such as consolidation of domestic power. See SUBOTIĆ, HIJACKED JUSTICE (especially Chapter 2 on the use of international criminal justice proceedings to reinforce nationalist narratives).
- 5 See *Reactions in Croatia to the Deaths of Slobodan Milosevic and Milan Babic*, OSCE, 15 Mar. 2006, <http://www.osce.org/zagreb/18630> (for public reaction to Milošević's death). At the time of Milošević's death, Croatian President Stjepan Mesić expressed his sorrow that Milošević did not live long enough for the ICTY to deliver a judgment. *Mesić: Milošević se može svrstati u red Pola Pota*, NACIONAL, 12 Mar. 2006, <http://www.nacional.hr/clanak/23732/mesic-milosevic-se-moze-svrstati-u-red-pola-pota>.
- 6 The initial judgment in the trial of Mrkšić, Radić, and Šljivančanin was delivered in September 2007. See *Pros. v. Mrkšić, Radić, and Šljivančanin* (2), Judgment (27 Sept. 2007) for the initial trial chamber judgment. Mrkšić and Šljivančanin's appeals judgment was



delivered in May 2009; Šljivančanin's final review judgment was delivered in December 2010. *Pros. v. Mrkšić and Šljivančanin*, Appeals Judgment (5 May 2009); *Pros. v. Šljivančanin*, Review Judgment (1), (8 Dec. 2010). The impact of these judgments in Croatia and their relevance to the *Milošević* trial's legacy will be discussed in greater detail later in this chapter.

- 7 Goran Hadžić's arrest and transfer to the ICTY in July 2011 may constitute an additional opportunity to prosecute the *Ovčara* case before the Tribunal. *Pros. v. Goran Hadžić*. Initial Indictment, (21 May 2004). For an overview of the series of political crises related to the ICTY faced by post-Tuđman Croatian governments, see Lamont, *Defiance or Strategic Compliance? The Post-Tuđman Croatian Democratic Union and the ICTY*, 62 EUROPE-ASIA STUD. 1683 (2010).
- 8 Cf. Butković, *Tuđmanova Hrvatska*, JUTARNJI LIST, 24 Jan. 2004, <http://www.jutarnji.hr/tudmanova-hrvatska/7317/> (noting "It is incontrovertible that at The Hague tribunal, for the most part, an official picture of events on the territory of the former Yugoslavia from 1990 to 1995 is being created, which will form the basis for the writing of a history of our region and our wars at the end of the 20th century.").
- 9 PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS; LAMONT, INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE.
- 10 See, e.g., Bass, *Milosevic in The Hague*, 82 FOREIGN AFF. 82 (2003). Bass' analysis of the trial's resonance in the former Yugoslavia is almost exclusively focused on Serbia and only ventures a guess as to its resonance elsewhere: "It is too early to see whether this will work for the people of Bosnia and Croatia, whose sufferings the court is just beginning to review. But surely it will give them some satisfaction[.]" *Id.* at 95–96.
- 11 This observation was made by the OSCE in *Reactions in Croatia to the Deaths of Slobodan Milosevic and Milan Babic*, OSCE SPOT REPORT, 15 Mar. 2006, <http://www.osce.org/zagreb/18630>.
- 12 Croatian Parliament, *Deklaraciju o domovinskom ratu*, OFFICIAL GAZETTE 102/2000, 13 Oct. 2000.



- 13 Croatian Parliament, *Rezoluciju o suradnji s međunarodnim kaznenim sudom u Haagu*, OFFICIAL GAZETTE 24/1999, 5 Mar. 1999.
- 14 All indictments can be found on the Tribunal's Web site:  
<http://www.icty.org>.
- 15 Pavlaković, "Better the Grave than a Slave: Croatia and the ICTY," in CROATIA SINCE INDEPENDENCE (Ramet, Clewing & Lukić eds.).
- 16 *Pros. v. Veselin Šljivančanin* (1), Review Judgement (8 Dec. 2010).
- 17 Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin were first indicted in October 1995, *see Pros. v. Mrkšić, Radić & Šljivančanin* (3), Initial Indictment (26 Oct. 1995). In the Second Amended Indictment, a JCE for the purpose of persecuting Croats or other non-Serbs at the Vukovar Hospital was alleged. *See Pros. v. Mrkšić*, Second Amended Indictment (28 Aug. 2002). In the Consolidated Amended Indictment, Mrkšić, Radić, and Šljivančanin were collectively accused of participation in a JCE. *See Pros v. Mrkšić, Radić & Šljivančanin* (1), Consolidated Amended Indictment (16 July 2003).
- 18 Barilar & Buligan, *Kosor: Teško je čuti za presudu dok su Mladić i Hadžić na slobodi*, JUTARNJI LIST, 8 Dec. 2010,  
<http://www.jutarnji.hr/veselin-sljivancanin-osuden-na-10-godina-zatvora--reakcije-na-presudu/909979/>.
- 19 *Pros. v. Milošević* (2), Croatia Indictment (27 Sept. 2001).
- 20 *See Sabolić, Miloševiću na teret i zločini u Hrvatskoj*, SLOBODNA DALMACIJA, 29 Sept. 2001,  
<http://arhiv.slobodnadalmacija.hr/20010929/novosti1.htm>.
- 21 *See Milošević case* (92), Trial Tr. 64-5 (12 Feb. 2002).
- 22 ICJ, *Croatian Genocide (Croatia v. Yugoslavia)*, 118, (2 July 1999),  
<http://www.icj-cij.org/docket/files/118/7125.pdf>.  
ICJ, *Croatian Genocide (Croatia v. Serbia)*.
- 23 Suljagić, "Justice Squandered? The Trial of Slobodan Milosevic," in PROSECUTING HEADS OF STATE 185 (Lutz & Reiger eds.). *See also* Hartmann at 469.
- 24 For more on Belgrade's exercise of control over the Croatian Serb Republic of Serbian Krajina, see Barić, "Rise and Fall of the Republic of Serb Krajina," in CROATIA SINCE INDEPENDENCE 93 (Ramet, Clewing & Lukić eds.). This would later be further confirmed in the Martić judgment, which posthumously condemned Slobodan Milošević for

- planning to create a Croatian Serb state and initiate violent conflict between the JNA and Croatian forces in 1991. Indeed, *Jutarnji list*'s coverage of Martić's conviction emphasized Milošević's place in the Judgment. See *Presudom Martiću potvrđena umiješanost JNA i Srbije*, JUTARNJI LIST, 12 June 2007, <http://www.jutarnji.hr/presudom-marticu-potvrđena-umijesanost-jna-i-srbije/178119/>.
- 25 *Iskaz svjedoka C-061 potvrđuje da Haški sud radi za Hrvatsku*, JUTARNJI LIST, 7 Dec. 2002, <http://www.jutarnji.hr/iskaz-svjedoka-c-061-potvrđuje-da-haaski-sud-radi-za-hrvatsku/7389/>.
- 26 Quoted in *Babić Miloševiću: Vodili ste strašan rat 1991. u koji ste uvukli Srbe*, VJESNIK, 7 Dec. 2002, [http://www.icty.org/x/cases/slobodan\\_milosevic/trans/en/021206IT.htm](http://www.icty.org/x/cases/slobodan_milosevic/trans/en/021206IT.htm).
- 27 *See Carla Del Ponte nagodila se s Beogradom*, JUTARNJI LIST, 14 Apr. 2007, <http://www.jutarnji.hr/carla-del-ponte-nagodila-se-s-beogradom/170393/>.
- 28 *See Carla Del Ponte nagodila se s Beogradom*, JUTARNJI LIST, 14 Apr. 2007, <http://www.jutarnji.hr/carla-del-ponte-nagodila-se-s-beogradom/170393/>.
- 29 *Sanader ispituje je li Del Ponte pomagala Srbiji*, JUTARNJI LIST, 15 Apr. 2007, <http://www.jutarnji.hr/sanader-ispituje-je-li-del-ponte-pomagala-srbiji/170473/>.
- 30 Šljivančanin's sentence was increased to 17 years on appeal and then subsequently reduced to 10 years. *Pros. v. Šljivančanin* (1), Review Judgment (8 Dec. 2010).
- 31 Quoted in McKenna, *Croats Protest Vukovar Judgment*, 521 IWPR TRI, 12 Oct. 2007, <http://iwpr.net/report-news/croats-protest-vukovar-judgment>.
- 32 Jungvirth, *Croatia Demands Arrest of Acquitted Serb*, 521 IWPR TRI, 12 Oct. 2007, <http://iwpr.net/report-news/croatia-demands-arrest-acquitted-serb>.
- 33 *Pravda je umrla u Den Haagu*, HRT, 8 Dec. 2010, [http://www.hrt.hr/index.php?id=48&tx\\_ttnews\[tt\\_news\]=97254&tx\\_ttnews\[backPid\]=38&cHash=3378a906b6](http://www.hrt.hr/index.php?id=48&tx_ttnews[tt_news]=97254&tx_ttnews[backPid]=38&cHash=3378a906b6) (including other reactions to the sentence, as well).
- 34 *Pros. v. Gotovina*, Indictment (21 May 2001).

- 35 Author's observation from field research conducted in Croatia between 2002 and 2010. Pavlaković argues, in relation to European Union-Croatia relations, that after Bobetko's death in 2003, Gotovina became "the single most important factor influencing relations between Zagreb and Brussels." Pavlaković, "Better the Grave than a Slave" 448. Furthermore, at the time of Milošević's death it was suggested in the Croatian media that this would have the effect of bringing forward the start date of the *Gotovina* trial. See Milošević *nađen mrtav u krevetu*, SLOBODNA DALMACIJA, 12 Mar. 2006, <http://arhiv.slobodnadalmacija.hr/20060312/novosti01.asp>.
- 36 CRUELIER & VALIÑAS, CROATIA: SELECTED DEVELOPMENTS IN JUSTICE DEVELOPMENTS 10.
- 37 Pavlaković, *Croatia, the ICTY, and General Gotovina as a Political Symbol*, 62 EUROPE-ASIA STUDIES 1710 (2010).
- 38 Mišetić: *Neću dopustiti da nas Brammertz uči o Oluji*, 24 SATA, 3 Jan. 2009, <http://www.24sata.hr/news/misetec-necu-dopustiti-da-nas-brammertz-uci-o-olui-95914>.
- 39 *Pros. v. Gotovina, Čermak & Markač* (1), Judgment Vol I & II, (15 Apr. 2011). Gotovina received 24 years, while Markač received 18 years. Ivan Čermak, former commander of the Knin garrison, was acquitted of all charges. Upon his return, Čermak was received by Prime Minister Jadranka Kosor. For a wide range of reactions to the verdict, see Vedran Brkulj, *Gotovina je naš Robin Hood i Superman*, TPORTAL.HR, 15 Apr. 2011, <http://www.tportal.hr/vijesti/hrvatska/122735/Gotovina-je-nas-Robin-Hood-i-Supermen.html>.
- 40 See Pusić, *O presudama, svjedocima i krivcima*, H-ALTER, 18 Apr. 2011, <http://www.h-alter.org/vijesti/ljudska-prava/o-presudama-svjedocima-i-krivcima> (for a critical assessment of Croatian media coverage of the *Gotovina* et al. verdict).
- 41 Government of the Republic of Croatia, *Predsjednica Vlade: presuda generalima nepravomoćna*, NEWS AND ANNOUNCEMENTS, 15 Apr. 2011, [http://www.vlada.hr/hr/naslovnica/novosti\\_i\\_najave/2011/travanj/predsjednica\\_vlade\\_presuda\\_generalima\\_nepravomocna](http://www.vlada.hr/hr/naslovnica/novosti_i_najave/2011/travanj/predsjednica_vlade_presuda_generalima_nepravomocna).
- 42 In a 2002 report delivered in response to a request from the Croatian government on the legality of HV operations during the war in Croatia,



- the Constitutional Court found that the HV had not violated domestic or international law in its wartime operations. *Deklaraciju o domovinskom ratu*, OFFICIAL GAZETTE 102/2000, 13 Oct. 2000; Croatian Constitutional Court, *Izvješće u povodu inicijative Vlade Republike Hrvatske*, OFFICIAL GAZETTE 133/2002, 15 Nov. 2002.
- 43 *Pros. v. Gotovina, Čermak & Markač* (5), Judgment Summary (15 Apr. 2011).
- 44 *U Splitu šok presudom Gotovini: “Ne bi mu Milošević dao 24 godine,”* INDEX.HR, 15 Apr. 2011, <http://www.index.hr/vijesti/clanak/u-splitu-sok-presudom-gotovini-ne-bi-mu-milosevic-dao-24-godine/547315.aspx>.
- 45 *Pros. v. Gotovina & Markač*, IT-06-90-A, Appeals Chamber Judgment (16 Nov. 2012).
- 46 *Gotovina i Markač su slobodni, Haaški sud: nije bilo udruženog zločinačkog pothvata*, JUTARNJI LIST, 16 Nov. 2012, <http://www.jutarnji.hr/gotovina-i-markac-su-slobodni—haaski-sud—nije-bilo-udruzenog-zlocinackog-pothvata—/1066689/>.
- 47 Illustrative of this was Josip Đakić, President of the Croatian War Invalids of the Homeland War’s, reaction to the Gotovina judgment in which he claimed Croatia had been condemned as a “criminal organization which was established by a crime.” *Reakcije: Borković: Ponosan sam što sam bio dio zločinačkog poduhvata! Đakić: Hrvatska osuđena kao zločinačka organizacija, Mesić bez komentara*, NOVI LIST, 15 Apr. 2011, <http://www.novilist.hr/hr/Vijesti/Hrvatska/REAKCIJE-Borkovic-Ponosan-sam-sto-sam-biodio-zlocinackog-poduhvata!-Dakic-Hrvatska-osudena-kao-zlocinacka-organizacija-Mesicbez-komentara>.
- 48 Interview with Marija Marić, Coordinator for Regional Cooperation, Documenta, in Zagreb, 8 Sept. 2010.

## CHAPTER 15

- 1 See SCHARF AND SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 51–54.
- 2 See HUM. RTS. WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO, <http://www.hrw.org/reports/2001/kosovo/undword-03.htm>.



- 3 ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 285.
- 4 Cufaj & Palokaj, *Milosheviqi pëballet me tmerret që i ka shkaktuar* ["Milošević faces terror he had caused"], KOHA DITORE, 21 Feb. 21 2002.
- 5 Palokaj, *Landovica dhe Suhareka grushtojnë Milosheviqin* ["Landovica and Suhareka fight back against Milošević"], KOHA DITORE, 26 Feb. 2002.
- 6 Palokaj, *Landovica dhe Suhareka grushtojnë Milosheviqin* ["Landovica and Suhareka fight back against Milošević"], KOHA DITORE, 26 Feb. 2002.
- 7 *Milosheviqi mori në bisedë informative Bakallin* ["Milošević interrogated Bakalli"], KOHA DITORE, 21 Feb. 2002.
- 8 Kelmendi, *Milosheviqi nuk është fajtor i vetëm* ["Milošević is not the only guilty one"], KOHA DITORE, 12 Feb. 2002.
- 9 Camaj, *Nuk mjafton vetëm Milosheviqi në Hagë* ["It is not enough to have just Milošević in The Hague"], KOHA DITORE, 13 Feb. 2002.
- 10 Arifaj, *Dhimbjen në Bellacerkë më asgjë nuk e shëron* ["Nothing heals the pain in Bellacerkë"], KOHA DITORE, 12 Feb. 2002.
- 11 Gacaferri, *Ku janë ekzekutorët e urdhrave të Milosheviqit, pyesin viktimat* ["Where are those who carried out Milošević's orders, victims ask"], KOHA DITORE, 12 Feb. 2002.
- 12 Kelmendi, *Milosheviqi nuk është fajtor i vetëm* ["Milošević is not the only guilty one"], KOHA DITORE, 12 Feb. 2002.
- 13 Surroi, *Fajësia e Milosheviqit dhe përgjegjësia e një shoqërie: Ku ndeshen Adolf Hitleri me ish-aparatçikun serb?* ["The Guilt of Milošević and Responsibility of a Society: Where Do Adolf Hitler and a Serb Ex-Bureaucrat Meet?"], KOHA DITORE, 12 Feb. 2002.
- 14 THOMAS, SERBIA UNDER MILOŠEVIĆ 427.
- 15 THOMAS, SERBIA UNDER MILOŠEVIĆ 427.
- 16 TEITEL, TRANSITIONAL JUSTICE 89.
- 17 See Belgrade Center for Human Rights and the OEEC, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal" (Dec. 2006), <http://www.osce.org/serbia/13161.html>.
- 18 See Summary of Findings 2008, Gallup Balkan Monitor, Insights and Perceptions: Voices of the Balkans, in Partnership with the European

Fund for the Balkans, [http://www.balkan-monitor.eu/files/BalkanMonitor-2008\\_Summary\\_of\\_Findings.pdf](http://www.balkan-monitor.eu/files/BalkanMonitor-2008_Summary_of_Findings.pdf), at 29.

- 19 See *Public Perception in Serbia of the ICTY and the National Courts Dealing with War Crimes* (Serbia, 2009), [http://www.osce.org/publications/srb/2009/12/41942\\_1399\\_en.pdf](http://www.osce.org/publications/srb/2009/12/41942_1399_en.pdf).
- 20 See *Public Perceptions of Transitional Justice in Kosovo*, UNDP 2007, [http://www.kosovo.undp.org/repository/docs/transitional\\_justice\\_eng.pdf](http://www.kosovo.undp.org/repository/docs/transitional_justice_eng.pdf).
- 21 See *Public Perceptions of Transitional Justice in Kosovo*, UNDP 2007, [http://www.kosovo.undp.org/repository/docs/transitional\\_justice\\_eng.pdf](http://www.kosovo.undp.org/repository/docs/transitional_justice_eng.pdf).
- 22 See de Quetteville, *Serbia Convicts Own Soldiers for War Crimes*, DAILY TELEGRAPH, 11 Apr. 2007; see also Humanitarian Law Center, *Transitional Justice Report: Serbia, Montenegro, and Kosovo, 1995–2005* (27 July 2006), <http://www.hlc.org>; International Center for Transitional Justice, *Serbia and Montenegro (and Kosovo)* (6 Feb. 2006), <http://www.ictj.org/en/where/regions4/624.html>; International Center for Transitional Justice (Mark Freeman), *Serbia and Montenegro: Selected Developments in Transitional Justice* (Oct. 2004), <http://www.ictj.org>; Hum. Rts. Watch, Report: Serbia and Montenegro (18 Jan. 2006), <http://hrw.org/english/docs/2006/01/18/serbia12242.htm>.
- 23 Ingimundarson, *Politics of Memory and the Reconstruction of Albanian National Identity in Postwar Kosovo*, 19 HISTORY & MEMORY 95–123. Waters at 297–99 and Nielsen at 328–332 also discuss different views on the role and capacity of international tribunals to tell the truth.
- 24 Ingimundarson, *Politics of Memory and the Reconstruction of Albanian National Identity in Postwar Kosovo*, 19 HISTORY & MEMORY 95–123.
- 25 See Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592–623.
- 26 Transitional Justice in Kosova, Discussion Paper, KIPRED, July 2009, [http://www.kipred.net/site/documents/ToJ\\_eng.pdf](http://www.kipred.net/site/documents/ToJ_eng.pdf), at 19.

- 27 Opening Statement of Carla del Ponte, Chief Prosecutor,  
[http://hague.bard.edu/past\\_video/02-2002.html](http://hague.bard.edu/past_video/02-2002.html).

## CHAPTER 16

- 1 See, e.g., *Milosevic Agrees to Meet with Ethnic Albanian over Kosovo*, N.Y. TIMES, 14 May 1998.
- 2 See *Milošević case* (161), Witness Statement of Veton Surroi 4–5 (27 Aug. 2001).
- 3 See *Milošević case* (102), Trial Tr. 3377:11-3380:14, 3396 (18 Apr. 2002).
- 4 For further discussion of the University Act, see Hum. Rts. Watch, *Deepening Authoritarianism in Serbia: The Purge of the Universities* (1 Jan. 1999), <http://www.unhcr.org/refworld/docid/3ae6a7f58.html>.
- 5 See *Pros. v. Đorđević*, Trial Tr. 273-74 (28 Jan. 2009).
- 6 See *Milošević case* (103), Trial Tr. 3398 (18 Apr. 2002).
- 7 See *Milošević case* (110), Trial Tr. (18–19 Apr. 2002).
- 8 See *Pros. v. Milutinović et al.* (1), Trial Tr. 4582:1-2 (10 Oct. 2006).
- 9 S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

## CHAPTER 17

- 1 HUM. RTS. WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOŠEVIĆ TRIAL* 6.
- 2 *Pros. v. Haradinaj, Balaj & Brahimaj* (1), Judgement (3 Apr. 2008). The ICTY later ordered a partial retrial for Haradinaj.
- 3 See Introduction and *infra* note 95 concerning nomenclature.
- 4 Press Release, ICTY, ICTY Donates Books to Pristina Law Faculty (6 Aug. 2010), <http://www.icty.org/sid/10440>.
- 5 *Be Careful with UN*, ZĚRI (UNMIK Media Monitoring), 20 June 2002.
- 6 KING & MASON, *PEACE AT ANY PRICE* 141.
- 7 See CLARK, *CIVIL RESISTANCE IN KOSOVO*.
- 8 Kelmendi, *Kosovars Split over Milošević Trial*, INST. FOR WAR & PEACE REPORTING (12 Feb. 2002), <http://iwpr.net/report-news/kosovars-split-over-milosevic-trial> (citing Florence Hartmann,

spokesperson for Carla Del Ponte). Kelmendi was editor of KOHA DITORE at this time.

- 9 Kelmendi, *Kosovars Split over Milošević Trial*.
- 10 HUM. RTS. WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 480.
- 11 *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević & Lukić* (1), Scheduling Order for Commencement of Trial (28 June 2006).
- 12 Kelmendi, *Kosovars Split over Milošević Trial*.
- 13 *Serbia dënon një ushtar për krime në Kosovë*, KOHA JONË, 9 July 2002, at 21. The judgment for this case and three others came in Oct. 2002 with low sentences of three to seven years. Tonicic, *Serbia: First War Crimes Trial*, INST. FOR WAR & PEACE REPORTING (16 Oct. 2002).
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## CHAPTER 18

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## CHAPTER 19

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  - 27 For variant accounts in Serb media of Milošević's alleged murder, see *Kako je s predumišljajem ubijan Slobodan Milošević*, PEČAT, 4 Apr. 2011, <http://www.srpskadijaspora.info/vest.asp?id=14663>. The murder allegations stem mainly from a conference of Serb and Russian forensic specialists and were expressed by politicians close to Milošević, see *EKSKLUZIVNO: Kako je s predumišljajem ubijan Slobodan Milošević*, PEČAT, 11 Mar. 2011, <http://www.pecat.co.rs/2011/03/ekskluzivno-kako-je-s-predumisljajem-ubijan-slobodan-milosevic/>. See Zimonjic, *Milosevic's Death Denies Justice*, IPS, 11 Mar. 2006 <http://ipsnews.net/news.asp?idnews=32467>.
  - 28 The outreach offices never were part of the ICTY'S core UN budget and relied on external funding. NETTLEFIELD, *COURTING DEMOCRACY: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE* 145.
  - 29 Summaries of the weekly press conferences were posted on the ICTY website. See, e.g., ICTY Weekly Press Briefing (23 June 2004) <http://www.icty.org/sid/3371/en>.
  - 30 See, e.g., Maupas, *Le procès de Milosevic, à nouveau reporté, doit faire l'objet d'une "révision radicale"* LE MONDE, 7 July 2004; Simons, *At Halfway Point of Milosevic Trial, Prosecutor Is Confident*, N.Y. TIMES, 1 Mar. 2004 (quoting legal experts who doubted whether genocide could be proven in Bosnia).
  - 31 Confidential orders were issued in July 2003 and at several points thereafter concerning the production and use of the VSO minutes. See *Milošević case* (34), First Decision on Admissibility of Supreme



- Defence Council Materials 3 (23 Sept. 2004); *Milošević case* (77), Second Decision on Admissibility of Supreme Defence Council Materials 3 (23 Sept. 2004). *See also Pros. vs. Hartmann*, Judgment ¶ 65 (19 July 2011).
- 32 ICJ, *Bosnian Genocide*, Judgment (26 Feb. 2007). The case is also discussed in Várady, Shany, Waters, and Hartmann.
- 33 *Milosevic Trial Criticised*, IRISH TIMES, 27 Feb. 2006.
- 34 This took place during the second half of February 2004. *See Simons, At Halfway Point of Milosevic Trial, Prosecutor Is Confident*, N.Y. TIMES, 1 Mar. 2004.
- 35 *See, e.g.,* Comiteau, *Milosevic on Trial, Day 3*, TIME, 14 Feb. 2002; Vulliamy, *Face to Face with the Victims of His Horror*, THE GUARDIAN, 17 Feb. 2002; Simons, *Lessons from a “Textbook” War Crimes Trial*, N.Y. TIMES, 19 Sept. 2004 (all quoting Dicker). Dicker was also quoted about the *Milošević* trial by *Le Monde* on 14 June 2002, 2 Sept. 2004, and 20 Oct. 2005, while throughout *Milošević*, HRW itself or HRW activists were mentioned or directly quoted in 20 of the *New York Times* articles on *Milošević*. Dicker was also quoted extensively in articles about *Milošević*’s death. *See, e.g.,* Simons & Crouch, *Milosevic Is Found Dead in Cell, UN Officials Say*, N.Y. TIMES, 12 Mar. 2006.
- 36 *See, e.g.,* HUM. RTS. WATCH, THE MILOSEVIC CASE: QUESTIONS AND ANSWERS (29 Aug. 2001), <http://www.hrw.org/en/news/2001/08/28/Milošević-case-questions-and-answers>. The release contains several questions that were being discussed in journalistic as well as academic circles at the time, such as the ICTY’s legitimacy, the chance of a fair trial for *Milošević*, and the issue of NATO war crimes during the bombing campaign in 1999. In all cases, the answers the (anonymous) authors gave were supportive of the ICTY.
- 37 IVANISEVIC, HUM. RTS. WATCH, THE MILOSEVIC TRIAL IS DOING ITS JOB (30 Aug. 2004), <http://www.hrw.org/en/news/2004/08/30/Milošević-trial-doing-its-job>.
- 38 HUM. RTS. WATCH, LAGGING BEHIND REALITY (10 Dec. 2003), <http://www.hrw.org/en/news/2003/12/10/lagging-behind-reality-0>.



- 39 For these doubts, see BOAS, *MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL PROCEEDINGS* 32–43, 97–108, 123–25, 152–59, 263–70.
- 40 See Simons, *An Unexpected Reversal of War-Crimes Convictions*, N.Y. TIMES, 29 Oct. 2009.
- 41 Sullivan & Finn, *Karadzic Case*.

## CHAPTER 20

- 1 Opinion, *The Trial of Slobodan Milošević*, N.Y. TIME, 11 Feb. 2002.
- 2 Douglas, *Justice Denied at The Hague?*, L.A. TIME, 14 Mar. 2006.
- 3 WALD, *TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM* 48.
- 4 See ABA MODEL CODE OF JUDICIAL CONDUCT, R. 2.10 cmt. 1 (2007) (noting that restrictions on judges’ interactions with the media “are essential to the maintenance of the independence, integrity and impartiality of the judiciary.”); see also BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (endorsed by the United Nations Human Rights Commission 2003); UK SUPREME COURT GUIDE TO JUDICIAL CONDUCT (2009) (each similarly intended to guide judicial conduct).
- 5 GUIDE TO JUDICIAL CONDUCT (Judges Council of England and Wales ed., 2011). Cf. BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 8.1.1. (2002).
- 6 ICTY, Prosecutor’s Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel 2.k (14 Sept. 1999) (issued by Louise Arbour), [http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp\\_regulation\\_990914.pdf](http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf).
- 7 ICTY, Prosecutor’s Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel 2.i (14 Sept. 1999) (issued by Louise Arbour), [http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp\\_regulation\\_990914.pdf](http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf).
- 8 Bajo, *Yugoslavia: Milosevic Trial Set to Begin Second Phase*, RADIO FREE EUROPE/RADIO LIBERTY, 24 Sept. 2002.
- 9 CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INTERNATIONAL TRIBUNAL, IT/125 REV. 3 (22 July 2009),

[http://www.icty.org/x/file/Legal%20Library/Defence/defence\\_code\\_of\\_conduct\\_july2009\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf). Anoya discusses evolving standards of conduct for defense counsel and self-representing defendants at the ICTY.

- 10 ICTY, R. P. & EVID. R. 77, IT/32/Rev. 45 (8 Dec. 2010), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev45\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf).
- 11 The Prosecution introduced testimony of a male sexual assault survivor, Alija Gusalić (*Milošević case* (135), Trial Tr. 18256ff (31 Mar. 2003) and (136) Trial Tr. 18269ff (1 Apr. 2003)) and from secondary sources who witnessed or were told about rape (Melika Malešević, *Milošević case* (134), Trial Tr. 17414ff (10 Mar. 2003); *Milošević case* (71), Public redacted version of the statement of Witness B-1455 (29 May 2003), *Milošević case* (139), Trial Tr. 21431ff (2–3 June 2003)).
- 12 See ARMATTA, TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOSEVIC, for a discussion of the testimonies of Lord Paddy Ashdown (34–41), Zoran Lilić (75–77), Dragan Vasiljković (172–79), Milan Babić (157–64), Wesley Clark (50–52, 311–15), Lord David Owen (266–69), Borisav Jović (129–36), and Ante Marković (127–29), among others.
- 13 WALD, TYRANTS ON TRIAL 47.
- 14 E.g., Armatta, *Fair Trial May Require Appointment of Counsel*, INST. FOR WAR AND PEACE REPORTING (27 July 2002), <http://iwpr.net/programme/34665/archive?page=2> (“It is clear by now that he is not capable of nor interested in mounting an effective defense on his own—even aside from physical limitations.”); Jennings, *Self-Representation under Scrutiny*, INST. FOR WAR AND PEACE REPORTING (6 Nov. 2009), <http://iwpr.net/report-news/self-representation-under-scrutiny> (“Milošević famously used his trial to deny the legitimacy of the court itself and devoted large portions of proceedings to political rhetoric.”); Armatta, *To Assure the Integrity of the Process: Tribunal Must Appoint Counsel* (13 Nov. 2002), <http://balkanwitness.glypx.com/articles-trial.htm> (“If the Trial Chamber decides that Milošević must present his case through a qualified lawyer he will neither be silenced nor muzzled. Indeed, his defense will be vastly improved....”).

- 15 Among English language reporters, see, for example, articles by Marlise Simons of *The New York Times*, AP reporters Anthony Deutsch and Katarina Kratovac, independent journalist Lauren Comiteau, Geraldine Coughlan of the BBC, Jeb Sharp of BBC World, Tom Hundley of the *Chicago Tribune*, and *The Washington Post*'s Keith Richburg.
- 16 SENSE AGENCY, [www.sense-agency.com](http://www.sense-agency.com).
- 17 INST. FOR WAR AND PEACE REPORTING, [www.iwpr.net](http://www.iwpr.net).
- 18 Comments on the *Justwatch* listserv suggest the value of these specialized sources to the broader journalistic community. See generally JUSTWATCH-L@listserv.buffalo.edu. IWPR continues to fill that important role in the *Karadžić* trial, according to Dragana Erjaveć, a Sarajevo-based reporter: "IWPR articles on the start of Karadžić's trial are very interesting, informative and provide a comprehensive overview of this case." INST. FOR WAR AND PEACE REPORTING (2 Dec. 2009), <http://IWPR.net/print/report-news/Karadzic-trial-coverage-praised>.
- 19 The SENSE Tribunal Project has been supported by the European Commission, governments of The Netherlands, Luxembourg, Switzerland and Germany, and the Open Society Institute (OSI). CIJ received funding from OSI, among other sources. IWPR, which has a broader mission than war crimes trial reporting, "maintains a diverse international base of private foundations, individuals, and government agencies." INST. FOR WAR AND PEACE REPORTING, <http://iwpr.net/what-we-do/supporters-and-partners>.
- 20 CIJ developed a sub-specialty of tracking the finances of persons accused of war crimes and issued six reports on financial support for Milošević, Charles Taylor, Karadžić, the Khartoum elite, and Saddam Hussein. Notably, CIJ's interviews with over 1,200 refugees from Darfur on the Chadian border led to the U.S. determination that genocide had occurred. *Sudan: Documenting Atrocities in Darfur*, RELIEFWEB (Sept. 2004). Never intended to be a permanent organization, CIJ closed in 2006. Its records have been archived at the Thomas J. Dodd Research Center, University of Connecticut Libraries.
- 21 See Bachmann's chapter.
- 22 See note 20, above.



- 23 See, e.g., Waters, *What Now for War Trials after Milosevic?*, CHRISTIAN SCI. MONITOR, 16 Mar. 2006 (“Milosevic’s death is a blow to the tribunal...”); Ford, *How Milosevic Death Sets Back Justice*, CHRISTIAN SCI. MONITOR, 13 Mar. 2006, (“[He] has set back the cause of international justice...”); Drumbl, *Milosevic Dies, Justice Denied*, RICHMOND POST DISPATCH, 15 Mar. 2006 (“As life left Milošević, so, too, might it now leave the Yugoslav Tribunal”); Romanov, *Milosevic’s Demise a Death Sentence to Hague Tribunal*, RIA NOVOSTI, (Moscow), 13 Mar. 2006 (“The death of Slobodan Milošević... is a death sentence to the Hague Tribunal for the former Yugoslavia.”); Silverman, *Worst Outcome for Milosevic Tribunal*, BBC NEWS, 11 Mar. 2006 (“[T]he death of Mr. Milosevic... will diminish the legacy of the most important court to be established in Europe since the end of the World War II.”).
- 24 See, e.g., Armatta & Chen, *Was Justice Ever Served? Evidentiary Record Will Outlive Milosevic*, CHI. TRIB., 17 Mar. 2006 (“While his trial did not reach a legal judgment, it did bring a measure of justice. It forced Milosevic to spend his last years in prison defending allegations for the gravest crimes instead of living in opulent exile or sowing further turmoil. Most important, it provided crucial evidence that stands as a condemnation of his regime and which undoubtedly will bring others to justice.”); Simms, Focus: *The Butcher Is Dead*, LONDON SUNDAY TIMES, 12 Mar. 2006 (“Yet the unfinished trial has achieved much. The evidence it threw up established clearly that Milosevic was the inspiration for the joint criminal enterprise to carve an ethnically pure Greater Serbia out of the ruins of Bosnia and Croatia.”); Dicker, *Milosevic Won’t Escape History’s Verdict*, INT’L HERALD TRIB., 12 Mar. 2006 (“The court has clearly suffered a blow, but its purpose was never limited to the trial of Serbia’s strongman.”); Douglas, *Justice Denied at The Hague?*, L.A. TIME, 14 Mar. 2006 (“Still, it is too early to condemn the Milošević trial as a failure [noting the trove of documents likely to become available as a result].”).
- 25 Farquhar & Anderson, *Serb Leader’s Death Tragic for Victims*, INST. FOR WAR AND PEACE REPORTING (17 Mar. 2006), <http://www.iwpr.net/report-news/serb-leaders-death-tragic-victims>.
- 26 WALD, TYRANTS ON TRIAL 48.
- 27 WALD, TYRANTS ON TRIAL 62.



- 28 I.C.C. Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court*, ¶ 2, ICC-ASP/5/12 (29 Sept. 2006).
- 29 See *Outreach*, ICC, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/>.
- 30 Rome Statute of the International Criminal Court (last amended Jan. 2002), 17 July 1998, A/CONF. 183/9, Art. 68.3.
- 31 *Trial Monitoring*, Open Society Justice Initiative, OPEN SOCIETY FOUNDATIONS, [www.soros.org/initiatives/justice/trial-monitoring](http://www.soros.org/initiatives/justice/trial-monitoring).
- 32 *Homepage*, CAMBODIA TRIBUNAL MONITOR, [www.cambodiatribunal.org](http://www.cambodiatribunal.org).
- 33 *International Justice*, HUM. RTS. WATCH, [www.hrw.org/en/category/topic/international-justice](http://www.hrw.org/en/category/topic/international-justice).

## CHAPTER 21

- 1 See, e.g., ICTY, *About the ICTY*, <http://www.icty.org/sections/AbouttheICTY> (“The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied.”); *The Hague Tribunal and Balkan Reconciliation*, INST. FOR WAR & PEACE REPORTING (15 Feb. 2010), <http://www.iwpr.net/report-news/hague-tribunal-and-balkan-reconciliation> [IWPR, *Hague Tribunal and Balkan Reconciliation*] (“[T]he ICTY boasts that in the light of the court’s work, ‘It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brcko, Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, Srebrenica, and Zvornik to name but a few.’ But the fact is that across the region, many people continue to do just that.”).
- 2 See, e.g., KOSTIĆ, *AMBIVALENT PEACE: EXTERNAL PEACEBUILDING, THREATENED IDENTITY AND RECONCILIATION IN BOSNIA AND HERZEGOVINA* 320 (reporting data from a 2005 survey in Bosnia that found the following definitions of the war: “Civil war”—3.7 percent of Bosniaks, 16.7 percent of Croats, and 83.6 percent of Serbs; “Aggression”—95.1 percent of Bosniaks, 73.2 percent of Croats, and 9 percent of Serbs).

- 3 *Milošević case* (1), Decision on Motion for Judgement of Acquittal (16 June 2004) [98bis Decision].
- 4 See BOAS, MILOŠEVIĆ TRIAL 121–23.
- 5 BOAS, MILOŠEVIĆ TRIAL 80.
- 6 See, e.g., ICTY, *About the ICTY*, <http://www.icty.org/sections/AbouttheICTY> (“[I]t has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.”). On the production of history through trials generally, see WILSON, WRITING HISTORY.
- 7 See Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 251–56 (2007) (“[E]nsuring that perpetrators of atrocities face some reckoning can be critical to moving forward on both an individual and community level in societies recovering from violent conflict.”); Press Release, Office of the High Representative, Bas-Backer: Reconciliation Indispensable for Post-War Recovery (27 Oct. 2006), [http://www.ohr.int/print/?content\\_id=38368](http://www.ohr.int/print/?content_id=38368) (“Justice, Truth, Peace and Forgiveness are four elements in a reconciliation process that is indispensable for post-war recovery”).
- 8 See, e.g., Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 774 (1998) (“[B]y exposing the truth before an official and impartial public forum, the ICTY can contribute significantly to altering power realities.... But the ICTY can only be effective if it can establish facts, hard and inescapable facts, with a moral or interpretive narrative based on elementary humanitarian values, which can become part of a shared truth for all peoples in the former Yugoslavia.... [T]he unifying power of truth telling can help heal the wounds, exorcise the specters of the past, and build a solid moral foundation for future generations.”).
- 9 Cf. IWPR, *Hague Tribunal and Balkan Reconciliation* (noting Pierre Hazan’s comment that criminal courts make it possible to “narrow the scope of permissible lies.... If you can do that, maybe you can have different memories which can coexist peacefully.”).
- 10 See, e.g., Naqvi, *Right to the Truth*, 88 INT’L REV. RED CROSS, June 2008, at 245, 246,

[http://www.icrc.org/eng/assets/files/other/irrc\\_862\\_naqvi.pdf](http://www.icrc.org/eng/assets/files/other/irrc_862_naqvi.pdf) (ICL's "unique objectives.... range from such lofty goals as contributing to 'the restoration and maintenance of peace' and 'the process of national reconciliation' to.... reconstructing national identities from interpretations of the past ... and setting down a historical record with a legal imprint."); *see also* Joyce, *Historical Function*, 73 NORDIC J. INT'L L. 461, 462–63 (2004).

- 11 *See, e.g.,* Wilson, *Judging History*, 27 HUM. RTS. Q. 918 (2005) (noting historical questions in the *Milošević* trial that "the ICTY ha[d] no choice but to decide"). As Boas, Mégret, and van der Wilt note, the Prosecution's approach was also a consequence of its charging strategy and its decision to seek joinder.
- 12 *See* Douglas, "History and Memory in the Courtroom: Reflections on Perpetrator Trials," *in* NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, at 95, 96 (Reginbogin & Safferling eds.) ("Trials ... particularly those burdened with the legacy of traumatic history, often succeed at shaping the terms of collective memory precisely by demonstrating—intentionally or not—a relaxed fidelity to the historical record.").
- 13 *See, e.g.,* Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 532 (2008) ("[T]he recent drive of the ICTY and ICTR toward completion of their proceedings has pushed the proceedings further away from some of their original political purposes and toward the adjudicative model.").
- 14 *See* Wilson, *Judging History*, 27 HUM. RTS. Q. 917-18 (2005) *See generally* Joyce, *Historical Function* 462–63 (assessing the narrative role of trials through a study of Philip Allott's, Hannah Arendt's, and Martha Minow's work, and proposing further recognition of trials' historical functions).
- 15 These views have a considerable pedigree. *See* ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 233 (suggesting that courts should not undertake historical interpretations of conflicts' origins); GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 173 ("[W]hatever it is that the law is after, it is not the whole story").
- 16 *See* OSIEL, MASS ATROCITY 79–94; Wilson, *Judging History*, 27 HUM. RTS. Q. 909 (2005) (explicating arguments for "the long-held

assumption in socio-legal scholarship that courts are inappropriate venues to construct wide-ranging historical explanations of past conflicts.”); Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UN L. 1, 11–19 (2002) (contrasting legal truth’s individual focus to historical truth’s contextual focus).

- 17 See BOAS, MILOŠEVIĆ TRIAL 32–43; Cockayne, *Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT’L L.J. 616, 669–74 (2005) (stressing that the recurrent problem of inequality of arms persists in the Special Court for Sierra Leone because of structural design flaws).
- 18 See WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 40–42; Scharf, *Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 31, 38–40 (2006) (arguing for imposition of counsel because of the complexity of international cases). See also Anoya’s chapter on self-representation, and Boas’s and Mégret’s on the complexities joinder imposed.
- 19 See, e.g., IWPR, *Hague Tribunal and Balkan Reconciliation* (“whatever chance the ICTY had to contribute to the complex process of reconciliation was for a long time compromised by its failure to engage with people in the region”). For an empirical critique of how tribunals generate unreliable witness testimony, in part because the process is unresponsive to cultural differences, see COMBS, FACT-FINDING WITHOUT FACTS.



- 20 See, e.g., ICTY, REPORT OF THE PRESIDENT ON THE CONFERENCE ASSESSING THE LEGACY OF THE ICTY 1–2 (27 Apr. 2010); IWPR, *Hague Tribunal and Balkan Reconciliation*.
- 21 See Boas & McCormack, *Learning the Lessons of the Milošević Trial*, 9 Y.B. INT'L HUMANITARIAN L. 65, 73–74 (2006) (“the Prosecution persistently proclaimed its responsibility to all the victims of the three theatres of conflict.... The Prosecution’s specific allegations against Milošević reflect a commitment to include reference to as many municipalities as possible.”).
- 22 See BOAS, MILOŠEVIĆ TRIAL 133–38; OSIEL, MASS ATROCITY 90; Teitel, *Bringing the Messiah through the Law*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 177, 182–83 (Hesse & Post eds.).
- 23 *Key Figures*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (22 July 2011), <http://www.icty.org/sections/TheCases/KeyFigures>. Ten died before even being transferred. *Id.*
- 24 *The Special Court for Sierra Leone: About*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>.
- 25 Cf. PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 177–82 (discussing the ICTR’s acquittal of Barayagwiza and subsequent reinstatement of the case against him); *Cases & Situations: Lubanga Case*, COALITION FOR INT'L CRIM. CT., <http://www.iccnw.org/?mod=drctimelinelubanga> (discussing the ICC’s near-release of Lubanga during his trial).
- 26 See, e.g., Sriram, “Justice for Whom? Assessing Hybrid Approaches to Accountability in Sierra Leone,” in SECURITY, RECONSTRUCTION, AND RECONCILIATION 145, 147 (Ndulo ed.) (“[P]unishment may serve to restore or install democracy, the rule of law, and respect for human rights by making it clear that law proscribes certain actions....”); *Death of Slobodan Milosevic*, TRANSITIONAL JUST. F. (11 Mar. 2006), <http://tj-forum.org/archives/001780.html> (“Even without a final verdict against Milošević, the ICTY has contributed to transitional justice in Bosnia....”).
- 27 Simons & Crouch, *Milosevic Is Found Dead in Cell*, U.N. Officials Say, N.Y. TIME, 12 Mar. 2006.

- 28 Cf. Naqvi, *The Right to Truth* 247 (“[T]he lack of a judgment has not deprived the four-year trial from achieving some of its objectives, in particular that of satisfying to some extent the right to the truth or setting down a historical record. The question that remains is whether a legal judgment is necessary to accord such evidence the status of representing ‘the truth.’”).
- 29 *Milošević case* (1), 98bis Decision ¶ 4. The *Amici*’s motion included confidential annexes.
- 30 See BOAS, MILOŠEVIĆ TRIAL 122. The earliest decisions (often brought under Rule 54, before Rule 98bis was promulgated) are only two or three pages but have been getting longer. Compare *Pros. v. Delalić*, Order on the Motions to Dismiss the Indictment (18 Mar. 1998) (three pages); *Pros. v. Blagojević*, Judgment on Motions for Acquittal (5 Apr. 2004) (21 pages). *Jelisić* and *Sikirica* are longer still, but deal with successful motions to acquit (and, in *Sikirica*, multiple accused). See *Pros. v. Jelisić* (1), Judgment (14 Dec. 1999); *Pros. v. Sikirica*, Judgment on Defense Motions to Acquit (3 Sept. 2001). Even these are less than half as long as the *Milošević* Decision.
- 31 See Freeland, “Commentary,” in ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS: ICTY, at 129, 135 (Klip & Sluiter eds.) (“the standard applied by the tribunal appears to be of a higher threshold than with the confirmation of an indictment.”).
- 32 See ICTY, R. P. & EVID. 98bis (B), IT/32/Rev. 17 (7 Dec. 1999) (amended 8 Dec. 2004). The Rule was amended shortly after the Decision, and, as discussed below, probably in consequence of it.
- 33 *Milošević case* (1), 98bis Decision ¶¶ 9–10 (citing *Pros. v. Jelisić* (2), Judgment ¶ 37 (5 July 2001), and noting contributions from *Delalić* and *Kordić*).
- 34 *Milošević case* (1), 98bis Decision ¶ 13(1-3).
- 35 *Milošević case* (1), 98bis Decision ¶ 13(4).
- 36 *Milošević case* (1), 98bis Decision ¶ 13(1).
- 37 See *Milošević case* (1), 98bis Decision ¶ 13(3), (6) (citing *Pros. v. Jelisić* (2), Judgment ¶ 55 (5 July 2001)).
- 38 *Milošević case* (1), 98bis Decision ¶ 293.
- 39 *Milošević case* (1), 98bis Decision ¶ 13(6).
- 40 *Milošević case* (1), 98bis Decision ¶ 12.

- 41 See, e.g., SCHARF & SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 97–100.
- 42 See Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOK. J. INT'L L. 553, 582 (2007); BOAS, MILOŠEVIĆ TRIAL 12 (“Milošević himself had no intention of playing into the prosecution’s hands and remaining mute while the case against him was laid out and determined. Despite his belligerence towards the court, he engaged in a robust and, at times, competent forensic defence”).
- 43 *Milošević case* (48), Order on Amici Curiae Request Concerning the Manner of their Future Engagement and Procedural Directions under Rule 98bis, at 2–3 (27 June 2003) (noting the *Amici*’s request for clarification of their role in relation to Rule 98bis and authorizing the absence of one *Amicus* to prepare the motion).
- 44 *Pros. v. Milošević* (22), Order Inviting Designation of *Amicus Curiae* 2 (30 Aug. 2001); see also SCHABAS, UN INTERNATIONAL CRIMINAL TRIBUNALS 621 (discussing the role of the *Amici* in *Milošević*).
- 45 *Milošević case* (5), Amici Curiae Motion for Judgement of Acquittal ¶ 161–63 (3 Mar. 2004).
- 46 *Milošević case* (5), Amici Curiae Motion for Judgement of Acquittal ¶ 2.
- 47 BOAS, MILOŠEVIĆ TRIAL 127–28.
- 48 See discussion of the Sarajevo counts, below.
- 49 Communication from one of the *Amici Curiae* to author (2011) (calling the decision to leave one charge of each “tactical”).
- 50 See, e.g., *UN Failed in Milosevic Genocide Case, Experts Say*, ASSOCIATED PRESS, 29 Feb. 2004, [http://www.sptimes.com/2004/02/29/Worldandnation/UN\\_failed\\_in\\_Milosevi.shtml](http://www.sptimes.com/2004/02/29/Worldandnation/UN_failed_in_Milosevi.shtml) (“When U.N. prosecutors opened their case against Slobodan Milosevic two years ago, they set out to get him convicted of genocide. The consensus today is, they failed.... ‘The prosecution was underwhelming,’ said Michael Scharf”).
- 51 *Milošević case* (59), Prosecution Motion for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal ¶ 2 (4 Feb. 2004).
- 52 See ICTY, R. P. & EVID. 98bis (A), IT/32/Rev. 17 (7 Dec. 1999) (amended 8 Dec. 2004) (“An *accused* may file a motion”) (emphasis

added).

- 53 *Milošević case* (21), Decision on Prosecution's Motion for a Ruling on the Competence of the Amici Curiae to Present a Motion for Judgement of Acquittal, at 2 (5 Feb. 2004) (dismissing motion "in the interests of justice as a whole").
- 54 *Milošević case* (53), Order to Prosecution on Indictments following Rule 98bis Decision, at 2 (20 July 2004).
- 55 *Milošević case* (79), Submission of Red-Lined Versions of Indictments ¶ 2 (20 July 2004).
- 56 *Milošević case* (69), Redline Indictments ¶ 3 (11 Aug. 2004).
- 57 *Milošević case* (69), Redline Indictments ¶ 7(b)–(d).
- 58 *Milošević case* (69), Redline Indictments ¶ 7(b) n.4 (noting also that "the Prosecution relies primarily on [three] expert reports[.]").
- 59 *Milošević case* (1), 98bis Decision ¶ 313; *see also Milošević case* (63), Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal ¶ 484 (23 Mar. 2004).
- 60 *Milošević case* (1), 98bis Decision ¶¶ 310–15.
- 61 *Milošević case* (69), Redline Indictments, Attach. B ¶¶ 43–45 (11 Aug. 2004).
- 62 *Milošević case* (69), Redline Indictments, Attach. B ¶ 45.
- 63 *Milošević case* (69), Redline Indictments, Attach. B ¶ 45.
- 64 *Milošević case* (69), Redline Indictments, Attach. B ¶ 4.
- 65 *See* Gibb, *First Criminal Trial with No Jury for 400 Years Starts*, TIMES (London), 13 Jan. 2010.
- 66 *Milošević case* (1), 98bis Decision ¶ 11.
- 67 *Milošević case* (1), 98bis Decision ¶ 13(3).
- 68 *Milošević case* (1), 98bis Decision ¶¶ 11, 13 (Robinson, J., concurring).
- 69 *Milošević case* (1), 98bis Decision ¶ 16.
- 70 *Milošević case* (1), 98bis Decision ¶ 17 (emphasis original).
- 71 Judge Robinson published an article the following year arguing for revision of Rule 98bis. *See* Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT'L CRIM. JUST. 1037, 1047–49 (2005). In the meantime, his view had prevailed: Rule 98bis was amended in December 2004, allowing the Chamber "by oral



decision and after hearing the oral submissions of the parties, [to acquit] on any count if there is no evidence capable of supporting a conviction.” ICTY, R. P. & EVID. 98bis (17 Dec. 2004) (amended 8 Dec. 2010). This is Robinson’s “whole-count” approach, without the 140-page document. *See* Press Release, ICTY, Judges Amend Rule 73(D) and 98bis at Plenary Session (10 Dec. 2004), <http://www.icty.org/sid/8320>. The recent Rule 98bis decision in *Pros. v. Karadžić* is an example of the more streamlined process.

- 72 *Cf. Pros. v. Strugar* (2), Decision on Defence Motion Requesting Judgement of Acquittal ¶ 17 (21 June 2004) (“Rarely, a case will arise where the only evidence in support of a conviction is so inherently incredible that no Trial Chamber could accept its truth.”).
- 73 *Milošević case* (1), 98bis Decision 140 ¶ 1 (Kwon, J., dissenting in part).
- 74 *Milošević case* (1), 98bis Decision ¶ 2.
- 75 Del Ponte, Press Conference of the ICTY Prosecutor (12 Mar. 2006), in 1 WAR CRIMES PROSECUTION WATCH, 20 Mar. 2006, [http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw\\_vol01issue03.html#yug2](http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol01issue03.html#yug2).
- 76 *See* ICJ, *Bosnoan Genocide* (26 Feb.) [*Bosnian Genocide*].
- 77 *Cf. Wedgwood, Slobodan Milosevic’s Last Waltz*, N.Y. TIMES, 12 Mar. 2007.
- 78 *Bosnian Genocide* ¶ 212.
- 79 *See Bosnian Genocide* ¶¶ 413–15.
- 80 *See, e.g., Simons, Genocide Court Ruled for Serbia without Seeing Full War Archive*, N.Y. TIMES, 9 Apr. 2007 (“[T]he outcome might well have been different had the [ICJ] pressed for access to the full archives, and legal scholars and human rights groups said it was deeply troubling that the judges did not subpoena the documents directly from Serbia.”).
- 81 *Bosnian Genocide* ¶ 209. The ICJ’s standard was controversial. *See* Birkland, *Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide*, 84 N.Y.U. L. REV. 1623, 1641–42 (2009) (“This onerous standard ... raised the threshold high enough effectively to shut the door on most complaints under the Genocide Convention.”).

- 82 *Bosnian Genocide* ¶ 214.
- 83 *Bosnian Genocide* ¶ 219.
- 84 *Bosnian Genocide*.
- 85 *Bosnian Genocide*.
- 86 *Bosnian Genocide* ¶ 219.
- 87 *Bosnian Genocide* ¶ 273 (citing Decision ¶ 159 and 161).
- 88 *Bosnian Genocide* ¶ 276.
- 89 *Bosnian Genocide* ¶¶ 304, 315–16.
- 90 *Bosnian Genocide* ¶¶ 274, 254, 258, 261, 263, 266, 268, 252, 266, 271–72, 274–75.
- 91 *Bosnian Genocide* ¶ 437 (citing *Milošević case*, Trial Tr. 30494-5 & 30497 (16 Dec. 2003), and Decision ¶ 280) (the ellipsis includes direct quotation of Clark’s testimony).
- 92 See 1978 I.C.J. Acts & Docs. Art. 62.
- 93 Groome, *Adjudicating Genocide*, 31 FORDHAM INT’L L.J. (2008).
- 94 Groome, *Adjudicating Genocide* 974–75.
- 95 Groome, *Adjudicating Genocide* 975 (emphasis added).
- 96 Groome, *Adjudicating Genocide* 964.
- 97 See Int’l Law Ass’n Hague Conference, 2010, *Final Report on the Meaning of Armed Conflict in International Law* 10–15, <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> [Int’l Law Ass’n, *Final Report*].
- 98 Int’l Law Ass’n, *Final Report* 14–15.
- 99 See *Milošević case* (1), 98bis Decision ¶ 15 (“Both the Prosecution and the *Amici Curiae* agree as to the requirement of an armed conflict for Articles 3 and 5 of the Statute.”). This is a profoundly uncontroversial point, and may be just a convenient way for the Chamber to note that.
- 100 *Milošević case* (1), 98bis Decision ¶¶ 15, 18.
- 101 *Milošević case* (1), 98bis Decision ¶ 300. There are many such examples.
- 102 See, e.g., *Pros. v. Stakić* (1), Decision on Rule 98bis Motion for Judgment of Acquittal ¶ 107 (31 Oct. 2002) (“the Trial Chamber observes that it derives from the very nature of the act of instigation and the fundamental requirement of causation, that a concrete person or group of persons prompted has not already, and independently from

the instigator, formed an intent to commit the crime in question (*omnimodo factururus*). Therefore, it would have been part of the Prosecutor's burden of proof to demonstrate [this], and, as such should have been pleaded in the Indictment.”).

- 103 See Dawson & Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 267–74 (2008) (describing the impact of Rule 98bis decisions in *Stakić* and *Milošević* on the distinction between complicity in and aiding and abetting genocide).
- 104 *Milošević case* (1), 98bis Decision ¶ 300.
- 105 See, e.g., *Milošević case* (1), 98bis Decision ¶ 25 (“On the basis of this evidence, the Trial Chamber is satisfied that the conflict in Kosovo meets the first element of the Tadić test.”).
- 106 ARMATTA, TWILIGHT OF IMPUNITY; BOAS, MILOŠEVIĆ TRIAL.
- 107 ORENTLICHER, SHRINKING THE SPACE 73; see also WILSON, WRITING HISTORY.

## CHAPTER 22

- 1 *Milošević case* (1), Decision on Motion for Judgment of Acquittal (16 June 2004) [98bis Decision]. The procedural background of the Decision is discussed in Waters.
- 2 Waters at 308, 312.
- 3 Waters at 296.
- 4 Waters at 313.
- 5 BOAS, MILOŠEVIĆ TRIAL 122.
- 6 On this particular task of the “didactic trial,” see Douglas, *Didactic Trial: Filtering History and Memory into the Courtroom*, 14 EUR. REV. 513, 515 (2006).
- 7 HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 462.
- 8 ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 251.

- 9 WALD, TYRANTS ON TRIAL 31. *See also* Steinitz, “*The Milosevic Trial —Live!*” *An Iconical Analysis of International Law’s Claim of Legitimate Authority*, 3 J. INT’L CRIM. JUST. 103 (2005). *See generally* WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS.
- 10 DEL PONTE & SUDETIC, MADAME PROSECUTOR 81. On the theatricality of the *Milošević* trial, *see also* Koskenniemi, “Between Impunity and Show Trials,” *in* POLITICS OF INTERNATIONAL LAW 171–97 (Koskenniemi ed.).
- 11 WALD, TYRANTS ON TRIAL 14.
- 12 Kwon, *Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT’L CRIM. JUST. 360, 372–73 (2007).
- 13 *Milošević case* (1), 98bis Decision ¶¶ 14–40, 41–80, 83–115. For a competent, descriptive overview of the Rule 98bis Decision, *see* Gaparayi, *Milosevic Trial at the Halfway Stage: Judgement on the Motion for Acquittal*, 17 LEIDEN J. INT’L L. 37 (2004).
- 14 *Milošević case* (1), 98bis Decision ¶ 316.
- 15 BOAS, MILOŠEVIĆ TRIAL 127.
- 16 For leading scholarly contributions, *see, for example*, Osiel, *Banality of Good: Aligning Incentives against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005); Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75 (2005); and van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT’L CRIM. JUST. 184 (2007). On JCE as an invented tradition, *see also* Meierhenrich, *Conspiracy in International Law*, 2 ANN. REV. L. & SOC. SCI. 341 (2006).
- 17 METTRAUX, INTERNATIONAL CRIMES 287–88.
- 18 For examples of this dissonance, *see the* contending interpretations of the JCE doctrine in *Pros. v. Tadić* (2), Appeal Judgment (15 July 1999); *Pros. v. Stakić* (2), Judgment (31 July 2003); *Pros. v. Krstić* (1), Appeal Judgment (19 Apr. 2004); *Pros. v. Brđanin* (4), Judgment (1 Sept. 2004); *Pros. v. Krajišnik* (7), Judgment (27 Sept. 2006); *Pros. v. Karadžić* (7), Decision on Accused’s Motion to Strike JCE III Allegations (8 Apr. 2011).
- 19 *Milošević case* (1), 98bis Decision ¶ 288.
- 20 METTRAUX, INTERNATIONAL CRIMES 293.



- 21 *Milošević case* (1), 98bis Decision ¶.
- 22 *Id.* at ¶ 291 (citing *Brđanin*).
- 23 For this argument, see also *Pros. v. Stakić* (2), Judgment (31 July 2003). For the opposite argument, namely that JCE and genocide can be reconciled, see van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. JUST. 184, 203–05 (2007).
- 24 *Milošević case* (15), Decision on Motion for Judgment of Acquittal, Dissenting Opinion ¶¶ 1–3 (16 June 2004).
- 25 BOAS, MILOŠEVIĆ TRIAL 126.
- 26 HUM. RTS. WATCH, WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL 55.
- 27 On this concept, see SYSTEM CRIMINALITY IN INTERNATIONAL LAW (Nollkaemper & van der Wilt eds.).
- 28 HUM. RTS. WATCH, WEIGHING THE EVIDENCE 56.
- 29 *Pros. v. Mladić* (2), Decision Pursuant to Rule 73bis (D) ¶14 (2 Dec. 2011).
- 30 Simons, *Lessons from a “Textbook” War Crimes Trial*, N.Y. TIMES, 19 Sept. 2004.
- 31 Cayley & Orenstein, *Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals*, 8 J. INT'L CRIM. JUST. 575, 590 (2010).
- 32 WEST, TRAIN OF POWDER 3.
- 33 HABERMAS, BETWEEN FACTS AND NORMS 226.
- 34 Douglas, *Didactic Trial: Filtering History and Memory into the Courtroom*, 14 EUR. REV. 513, 521 (2006).

## CHAPTER 23

- 1 Important works analyzing the interrelationship of international criminal law and history include BLOXHAM, GENOCIDE ON TRIAL; DOUGLAS, MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST; PENDAS, FRANKFURT AUSCHWITZ TRIAL; OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW; WILSON, WRITING HISTORY.

- 2 *Milošević case* (1), Decision on Motion for Judgement of Acquittal (16 June 2004) [98bis Decision]. This version does not contain the footnotes; the full document (146 pages) can be accessed through the ICTY's Court Records Database.
- 3 *Milošević case* (1), 98bis Decision ¶ 316.
- 4 Scharf, *Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 917 (2003).
- 5 Higgins, *Impact of the Size, Scope and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW. U. J. INT'L HUM. RTS. 246 (2009).
- 6 Wachtel & Bennett, "The Dissolution of Yugoslavia," in CONFRONTING THE YUGOSLAV CONTROVERSIES 29 (Ingrao & Emmert eds.).
- 7 *Milošević case* (1), 98bis Decision ¶ 9. [emphasis in original].
- 8 BOAS, MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 79–120; Gow & Zverzhanovski, *Milošević Trial: Purpose and Performance*, 32 NATIONALITIES PAPERS 901 (2004).
- 9 BOAS, MILOŠEVIĆ TRIAL. Boas also addresses the joinder in his chapter, whereas Del Ponte, Askin, and others discuss the Chamber's attitude toward Milošević's behavior in court. For a perspective from defense counsel, see also Higgins, *Impact of the Size, Scope and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW. U. J. INT'L HUM. RTS. (2009).
- 10 Guénaél Mettraux to Sefer Halilović regarding the International Military Tribunal in Nuremberg and the ICTY, METTRAUX, PERSPECTIVES ON THE NUREMBERG TRIAL 19.
- 11 DOUGLAS, MEMORY OF JUDGMENT 2 ("Many important histories of the Holocaust, such as Raul Hilberg's *The Destruction of the European Jews*, could not have been written without the massive archive of documentary evidence assembled through Nuremberg's act of legal discovery.").
- 12 Gideon Boas is the most prominent and reasoned proponent of this view. See also Suljagić, "Justice Squandered? The Trial of Slobodan Milošević," in PROSECUTING HEADS OF STATE 176–204 (Lutz ed.).
- 13 Thomas J. Dodd, quoting Jackson, in METTRAUX, PERSPECTIVES ON NUREMBERG 190.

- 14 PENDAS, FRANKFURT AUSCHWITZ TRIAL, at 2.
- 15 On trials of Holocaust deniers, see DOUGLAS, MEMORY OF JUDGMENT 212–56; KAHN, HOLOCAUST DENIAL AND THE LAW.
- 16 *Living History Interview with Judge Richard Goldstone*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 373, 377 (1995).
- 17 *Milošević case* (83), Trial Tr. 8:11-2 (12 Feb. 2002).
- 18 *Milošević case* (86), Trial Tr. 10:13-6 (12 Feb. 2002).
- 19 *Milošević case* (87), Trial Tr. 15:14-23 (12 Feb. 2002).
- 20 JUSTIZ UND NS-VERBRECHEN (Bauer et al. eds.). “Erkenntnis” can also be translated to English as “knowledge,” “perception,” “insight,” or “realization.”
- 21 DOUGLAS, MEMORY OF JUDGMENT. The title of Douglas’ third chapter is “The Father Pointed to the Sky: Legitimacy and Tortured History.”
- 22 DOUGLAS, MEMORY OF JUDGMENT 89–90. This is analogous to Pendas’ point, mentioned earlier, about the failure of the Frankfurt Auschwitz trial to grasp the “exponential character of Nazi genocide.”
- 23 *Milošević case* (1), 98bis Decision ¶ 4. The Prosecution filed a confidential response on 23 March 2004.
- 24 *Milošević case* (1), 98bis Decision ¶ 5.
- 25 *Milošević case* (1), 98bis Decision ¶ 5.
- 26 BOAS, MILOŠEVIĆ TRIAL 122–23. In his book, Boas uses the terms “judgment of acquittal” and “Rule 98bis Decision” interchangeably.
- 27 *Milošević case* (1), 98bis Decision ¶ 9 (quoting ICTY Appeals Chamber judgment in *Pros. v. Jelisić* (2), Appeal Judgement ¶ 37 (emphasis in original) (5 July 2001)).
- 28 *Pros. v. Krajišnik* (2), IT-00-39-T, Judgement ¶¶ 1181, 1248 (27 Sept. 2006).
- 29 HUM. RTS. WATCH, WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOŠEVIĆ TRIAL 1.
- 30 *Milošević case* (1), 98bis Decision ¶ 23.
- 31 *Milošević case* (1), 98bis Decision ¶¶ 14-5.
- 32 *Milošević case* (1), 98bis Decision ¶23. However, it should be noted that the Trial Chamber did not cite any examples of such evidence.
- 33 *Milošević case* (1), 98bis Decision ¶ 27ff (the subsequent paragraphs of the Decision rely extensively on evidence from the trial cited by the

*Amici* to reach the conclusion that an armed conflict existed in Kosovo).

- 34 *Milošević case* (1), 98bis Decision ¶ 40. This chapter does not deal with the less significant discussion in the Decision regarding deportation and forcible transfer.
- 35 *Milošević case* (5), *Amici Curiae* Motion for Judgement of Acquittal ¶ 84-6 (3 Mar. 2004).
- 36 *Milošević case* (1), 98bis Decision ¶ 83.
- 37 *Milošević case* (1), 98bis Decision ¶ 115.
- 38 *Milošević case* (1), 98bis Decision ¶ 140. The membership of the JCE varied for the *Croatia*, *Bosnia*, and *Kosovo* indictments; only Milošević occupies all three sections of the JCE.
- 39 *Milošević case* (1), 98bis Decision ¶ 117.
- 40 *Milošević case* (5), *Amici Curiae* Motion for Judgement of Acquittal ¶ 156-62 (3 Mar. 2004).
- 41 *Milošević case* (1), 98bis Decision ¶ 141.
- 42 *Milošević case* (1), 98bis Decision ¶ 246.
- 43 *Milošević case* (1), 98bis Decision ¶ 247.
- 44 *Milošević case* (1), 98bis Decision ¶¶ 249–56.
- 45 *Milošević case* (1), 98bis Decision ¶ 257.
- 46 *Milošević case* (1), 98bis Decision ¶¶ 258–60. The 40th Personnel Center performed an analogous function for the SVK. *Id.* at ¶ 260.
- 47 *Milošević case* (1), 98bis Decision ¶ 266.
- 48 *Milošević case* (1), 98bis Decision ¶¶ 278, 282, 285.
- 49 *Milošević case* (1), 98bis Decision ¶¶ 280, 284.
- 50 *Milošević case* (1), 98bis Decision ¶¶ 282-3.
- 51 *Milošević case* (1), 98bis Decision ¶ 288.
- 52 BOAS, THE MILOŠEVIĆ TRIAL 126.
- 53 *Milošević case* (1), 98bis Decision ¶ 290.
- 54 *Milošević case* (1), 98bis Decision ¶¶ 290-1.
- 55 *Pros. v. Krajišnik* (2), IT-00-39-T, Judgement ¶ 6 (27 Sept. 2006) (mentioning Biljana Plavšić, Radovan Karadžić, Nikola Koljević, Željko (“Arkan”) Ražnatović, General Ratko Mladić, General Momir Talić, and Radoslav Brđanin as other members of the JCE).



- 56 This strand of skepticism, typical prior to the arrest of Milošević, is found in BASS, STAY THE HAND OF VENGEANCE.
- 57 *Pros. v. Tadić* (1), IT-94-1-T, Opinion and Judgement ¶ 72 (7 May 1997) [*Tadić Judgement*].
- 58 *Tadić Judgement* ¶ 83.
- 59 *Tadić Judgement* ¶ 131.
- 60 *Tadić Judgement* ¶¶ 183, 474.
- 61 *Tadić Judgement* ¶ 84. In addition to Greater Serbia, the *Tadić* judgment also identified a concept of Greater Croatia that would include all Croats living in the territory of the former Yugoslavia.
- 62 See, e.g., *Pros. v. Krajišnik* (2), IT-00-39-T, Judgement ¶¶ 45, 61, 66, 924 (27 Sept. 2006) (finding that in 1991 and 1992 Milošević knew of, supported and discussed with the Bosnian Serbs their plans to seize military and political control of large parts of Bosnia).
- 63 *Pros. v. Babić* (3), Sentencing Judgement ¶¶ 23-4 (29 June 2004).
- 64 *Pros. v. Babić* (3), Sentencing Judgement ¶ 70.
- 65 *Pros. v. Martić* (1), Judgement ¶ 133 (12 June 2007) [*Martić Judgement*].
- 66 *Martić Judgement* ¶ 329.
- 67 *Martić Judgement* ¶¶ 140, 149, 157, 322.
- 68 *Martić Judgement* ¶ 140.
- 69 *Martić Judgement* ¶ 314.
- 70 *Martić Judgement* ¶ 336.
- 71 *Pros. v. Perišić* (3), IT-04-81-T, Judgement, ¶ 765 (6 Sept. 2011) [*Perišić Judgement*] (“here” presumably meaning, in context, the FRY).
- 72 *Perišić Judgement* ¶ 787.
- 73 *Perišić Judgement* ¶¶ 1303-6.
- 74 *Perišić Judgement* ¶ 1306.
- 75 *Perišić Judgement* ¶ 1309.
- 76 *Perišić Judgement* ¶ 1312.
- 77 *Perišić Judgement* ¶¶ 1365-9.
- 78 *Perišić Judgement* ¶¶ 1411-2.
- 79 *Perišić Judgement* ¶ 1530.
- 80 *Perišić Judgement* ¶¶ 1543-4.

- 81 *Perišić* Judgement ¶ 1545.
- 82 *Perišić* Judgement ¶ 1556.
- 83 *Perišić* Judgement §§ 1710-28.
- 84 *Perišić* Judgement ¶ 1762. The inability of the Trial Chamber to agree on the exact nature of the command relationship between Perišić and Milošević caused Judge Moloto to file a dissenting opinion to the judgment.
- 85 *Interview with Vojin Dimitrijević*, POLITIKA, 28 Feb. 2009; *Teret haške pravde*, DANAS, 1 Mar. 2009; M. Albunović, *Zločinački poduhvat' i samoopredeljenje*, POLITIKA, 2 Mar. 2009.
- 86 *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević & Lukić* (5), Judgement Vol. 1, ¶ 284 (26 Feb. 2009) [*MOS Judgement*, with Vol.].
- 87 *MOS Judgement*, Vol. 1, ¶ 682 (26 Feb. 2009).
- 88 *MOS Judgement*, Vol. 3, ¶ 129 (26 Feb. 2009).
- 89 *MOS Judgement*, Vol. 3, ¶ 130.
- 90 *MOS Judgement*, Vol. 1, ¶ 362 (26 Feb. 2009).
- 91 *MOS Judgement*, Vol. 1, §§ 1111, 1119. Such indirect communication and control formed part of the basis of the criminal liability of Nebojša Pavković.
- 92 *MOS Judgement*, Vol. 1, ¶ 1109.
- 93 *MOS Judgement*, Vol. 1, ¶ 410.
- 94 *MOS Judgement*, Vol. 1, ¶ 988.
- 95 *MOS Judgement*, Vol. 2, ¶ 1356 (26 Feb. 2009).
- 96 *MOS Judgement*, Vol. 3, ¶ 87 (26 Feb. 2009).
- 97 *MOS Judgement*, Vol. 3, ¶ 291.
- 98 *MOS Judgement*, Vol. 3, ¶ 292.
- 99 *MOS Judgement*, Vol. 3, §§ 99–284.
- 100 *MOS Judgement*, Vol. 3, ¶ 129.
- 101 *MOS Judgement*, Vol. 3, ¶ 130.
- 102 *MOS Judgement*, Vol. 3, ¶ 274.
- 103 *Pros. v. Đorđević*, Judgement Vol. 1, ¶ 79 (23 Feb. 2011) [*Đorđević Judgement*].
- 104 *Đorđević* Judgement, Vol. 1, ¶ 196.
- 105 *Đorđević* Judgement, Vol. 2, ¶ 2023.

- 106 *Dorđević* Judgement, Vol. 2, ¶¶ 1373, 2112–13, 2118, 2181.
- 107 *Dorđević* Judgement, Vol. 2, ¶ 1898.
- 108 *Dorđević* Judgement, Vol. 2, ¶¶ 2127–2128.
- 109 *Dorđević* Judgement, Vol. 2, ¶ 2137.
- 110 *Dorđević* Judgement, Vol. 2, ¶ 2211.
- 111 Gow & Zverzhanovski, *Milošević Trial* 916.
- 112 These same critics typically see the *Karadžić* and *Mladić* cases as the ICTY's last chances to redeem itself. See, e.g., Sullivan & Finn, *Karadžić, Case Offers Court a Chance to Repair Its Image*, WASH. POST, 24 July 2008.
- 113 Gow & Zverzhanovski, *Milošević Trial* 899–900.
- 114 DOUGLAS, MEMORY OF JUDGMENT; BLOXHAM, GENOCIDE ON TRIAL.
- 115 BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND; Houwink ten Cate, *Enlargement of the Circle of Perpetrators of the Holocaust*, 20 JEWISH POLITICAL STUDIES REVIEW 51–72 (Fall 2008).
- 116 Higgins, “Milošević S.,” in OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 814 (Cassese ed.). Emir Suljagić highlights the need to go beyond the judgments in cases and look at the totality of information presented during the proceedings in *Milošević*. Suljagić, “Justice Squandered? The Trial of Slobodan Milošević,” in PROSECUTING HEADS OF STATE 184–86 (Lutz & Reiger eds.).
- 117 Noteworthy existing works on Slobodan Milošević by scholars and publicists include: COHEN, SERPENT IN THE BOSOM—THE RISE AND FALL OF SLOBODAN MILOŠEVIĆ; DODER & BRANSON, MILOŠEVIĆ: PORTRAIT OF A TYRANT; ĐUKIĆ, MILOŠEVIĆ AND MARKOVIĆ: A LUST FOR POWER; HARTMANN, MILOŠEVIĆ: LA DIAGONALE DU FOU; LEBOR, MILOŠEVIĆ: A BIOGRAPHY; SELL, SLOBODAN MILOŠEVIĆ AND THE DESTRUCTION OF YUGOSLAVIA; THOMAS, SERBIA UNDER MILOŠEVIĆ—POLITICS IN THE 1990S.
- 118 CONFRONTING THE YUGOSLAV CONTROVERSIES (Ingrao & Emmert eds.).

## CHAPTER 24

- 1 See, e.g., GLAURDIĆ, HOUR OF EUROPE.

- 2 Nielsen at 329.
- 3 See, e.g., Eltringham, “*We Are Not a Truth Commission*”: *Fragmented Narratives and the Historical Record at the ICTR*, 11 J. GENOCIDE RES. 57 (2009). Waters makes a similar point, at 298-99 and 314-15.
- 4 *Milošević case* (39), Milosevic Amended Expert Report, Ex. P508 (23 July 2003).
- 5 *Pros. v. Milošević* (29), Public Transcript of Hearing 72 (11 Dec. 2001).
- 6 GAGNON, JR., MYTH OF ETHNIC WAR: SERBIA AND CROATIA IN THE 1990s.
- 7 KAUFMAN, MODERN HATREDS: SYMBOLIC POLITICS OF ETHNIC WAR.
- 8 For an analysis of additional perspectives on Milošević’s motivations, see RAMET, THINKING ABOUT YUGOSLAVIA: SCHOLARLY DEBATES 159–89.
- 9 Bessel, *Functionalists versus Intentionalists: The Debate Twenty Years*, 26 GERMAN STUD. REV. 15, 15–20 (2003); Welch, A Survey of Interpretive Paradigms in Holocaust Studies and a Comment on the Dimensions of the Holocaust, GSP WORKING PAPERS no. 17, 2001, <http://www.yale.edu/gsp/publications/Holocaust.doc>.
- 10 Browning, “Beyond ‘Intentionalism’ and ‘Functionalism’: A Reassessment of Nazi Jewish Policy from 1939 to 1941,” in REEVALUATING THE THIRD REICH 211 (Childers & Caplan eds.).
- 11 See BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND.
- 12 One of the exceptions is Glaudrić, *Inside the Serbian War Machine: The Milošević Telephone Intercepts, 1991–1992*, E. EUR. POL. & SOC’Y, Feb. 2009, at 86–104 (making extensive use of ICTY evidence).
- 13 ANDREAS, BLUE HELMETS AND BLACK MARKETS: THE BUSINESS OF SURVIVAL IN THE SIEGE OF SARAJEVO; Fotini, *Following the Money: Muslim versus Muslim in Bosnia’s Civil War*, 40 COMP. POL. 461 (2008).
- 14 CASPERSEN, CONTESTED NATIONALISM: SERB ELITE RIVALRY IN CROATIA AND BOSNIA IN THE 1990s.
- 15 Hartmann discusses the shifting priorities of the Prosecution across different cases, including the ways in which different trials have



characterized the relationship and responsibility of members of the JCE Milošević allegedly headed.

- 16 *Pros. v. Seselj* (7), Public Transcript of Hearing, Trial Tr. 5068 (20 Mar. 2008).
- 17 *Milošević case* (154), Trial Tr. 11917 (7 Sept. 2005).
- 18 Šešelj made similar argument when the excerpt was replayed during his own trial. *Pros. v. Seselj* (8), Trial Tr. 5068-9 (20 Mar. 2008).
- 19 Polishuk, *Secrets, Lies and Misremembering: Perils of Oral History Interviewing*, 19 FRONTIERS: J. OF WOMEN STUD., no. 3 (1998), at 14–23.
- 20 Eltringham, “*We Are Not a Truth Commission*”: *Fragmented Narratives and the Historical Record at the ICTR*, 11 J. GENOCIDE RES. 66 (2009) (referring to lawyers at the ICTR).
- 21 *Id.*
- 22 Wallot & Fortier, “Archival Science and Oral Sources,” in ORAL HISTORY READER 365, 366–67 (Perks & Thomson, eds.).
- 23 Ginzburg, *Checking the Evidence: The Judge and the Historian*, 18 CRITICAL INQUIRY 83 (1991).
- 24 See, e.g., LAUGHLAND, TRAVESTY: THE TRIAL OF SLOBODAN MILOŠEVIĆ AND THE CORRUPTION OF INTERNATIONAL JUSTICE.
- 25 Waters makes this very point, at 313-15.
- 26 Ginzburg, *Checking the Evidence* 90.

## CHAPTER 25

- 1 *Milošević case* (32), Exhibit P667.47.1a 5 (6 Dec. 1995) (notes of the 47th Enlarged Session of the *Vrhovni Savet Odbrane*) [VSO Stenographic Notes (with date)]. All translations are my own; all stenographic notes discussed in this chapter have been publicly redacted.
- 2 *Pros. v. Karadžić & Mladić* (1), Indictment (14 Nov. 1995).
- 3 VSO Stenographic Notes 10 (6 Dec. 1995).
- 4 *Milošević case* (68), Prosecution’s Second Pre-Trial Brief ¶¶ 259ff. (31 May 2002).

- 5 *Milošević case*, Trial Tr. 25 (12 Feb. 2002) (Opening statement of Geoffrey Nice).
- 6 *Milošević case* (68), Prosecution's Second Pre-Trial Brief ¶ 2 (31 May 2002).
- 7 *Milošević case* (68), Prosecution's Second Pre-Trial Brief ¶ 64 (31 May 2002) (internal quote is to Prosecution exhibit 427.32, "VRS analysis of combat readiness and activities of the Army of Republika Srpska in 1992").
- 8 *Milošević case* (68), Prosecution's Second Pre-Trial Brief ¶ 4 (31 May 2002).
- 9 See Nielsen and Hartmann on these other trials.
- 10 VSO Stenographic Notes 19-20 (9 Dec. 1992).
- 11 VSO Stenographic Notes 15 (2 June 1993).
- 12 VSO Stenographic Notes 5 (11 Oct. 1993).
- 13 VSO Stenographic Notes 16-17 (14 Aug. 1995). The speaker is Blagoje Kovačević, Deputy Chief of the VJ General Staff.
- 14 VSO Stenographic Notes 28, 30 (10 Feb. 1993) (page 29 has been redacted).
- 15 VSO Stenographic Notes 13-14 (2 June 1993).
- 16 VSO Stenographic Notes 13-14 (2 June 1993).
- 17 At a meeting between Ratko Mladić, Milošević, Jovica Stanišić and others on 30 June 1995, recorded in Mladić's diary, Stanišić complained that "we have been supplying 100,000 men for six months, there is poor organization in RS, they plundered us," and Milošević said "we helped you, but we are at our last gasp." *Pros. v. Gotovina et al.* (3), Exhibit D01465.E, Excerpts from Mladić's diary.
- 18 VSO Stenographic Notes 15 (2 June 1993).
- 19 VSO Stenographic Notes 20 (2 June 1993).
- 20 *Milošević case* (2), Amended Indictment "Bosnia and Herzegovina" ¶ 43 (22 Nov. 2002).
- 21 *Milošević case* (2), Amended Indictment "Bosnia and Herzegovina" schedules E and F (22 Nov. 2002). The *Galić* case charged events in the siege beginning "on or about" 10 September 1992. *Pros. v. Galić* (1), Indictment ¶ 5 (26 Mar. 1999); see also *Pros. v. Galić* (2), Judgment ¶ 205 (5 Dec. 2003). The *Dragomir Milošević* case covered the period from 10 Aug. 1994 to 21 Nov. 1995. *Pros. v. Dragomir Milošević*, IT-

- 98-29/1, Amended Indictment ¶¶ 3–5 (18 Dec. 2006). The initial indictment against Karadžić and Mladić included shelling incidents as early as 3 July 1992 (*Pros. v. Karadžić & Mladić* (2), Indictment ¶ 26 (24 July 1995)), but the amended indictment of 28 April 2000 dropped all specific incidents in favor of a general allegation.
- 22 VSO Stenographic Notes, 8 July 1992 & 23 July 1992, *passim*.
- 23 VSO Stenographic Notes 9-10 (6 Dec. 1995) (comments of Milošević).
- 24 VSO Stenographic Notes 51 (13 Mar. 13, 1993).
- 25 *Milošević case* (30), Exhibit P641.2, Statement of Hrvoje Šarinić ¶ 2ff. (26 Jan. 1991).
- 26 VSO Stenographic Notes (Public Redacted Version) 23 (30 Aug. 1994).
- 27 *Milošević case* (30), Exhibit P641.2, Statement of Hrvoje Šarinić ¶ 44 (26 Jan. 1991).
- 28 *Pros. v. Gotovina et al.* (1), Exhibit D01465.E, Excerpts from Mladić’s diary 4096 (2 June 2009) (Discussing meeting of 29 June 1995).
- 29 *Milošević case* (25), Exhibit 469.20, Notes from a meeting between Milošević and Bosnian Serb leadership, at 11–13 (29 Aug. 1995).
- 30 Jovica Stanišić, presenting a gift to Milošević at the eighth anniversary of the founding of the *Jedinica za specijalne operacije* (Special Operations Unit or JSO, often referred to simply as *jedinica*, “the unit”), the paramilitary arm of Serbia’s SDB, under whose umbrella numerous semi-private paramilitaries operated. *Milošević case*, Exhibit P390.3, Corrected Transcript of Video 7 (19 Feb. 2003).
- 31 VSO Stenographic notes 20-1 (12 Mar. 1993).
- 32 *Milošević case* (137), Trial Tr. 19426 (Apr. 2003).
- 33 VSO Stenographic notes 14 (31 July 1992). A protected witness in another trial testified that Arkan had commanded the combined Serb assault on Zvornik in April 1992. *Prosecutor v. Šešelj* (1), 14934-36, 14999 (13 Jan. 2010).
- 34 VSO Stenographic notes 14 (31 July 1992). Montenegrin president Momir Bulatović noted drily, “he wasn’t under military command, he was in charge over there.” *Id.*
- 35 VSO Stenographic notes 20 (31 July 1992).
- 36 VSO Stenographic notes, 7 Aug. 1992, public redacted version, at 6. Note that Milošević was not present at this session.
- 37 VSO Stenographic notes, 7 Aug. 1992, public redacted version, at 12.

- 38 VSO Stenographic notes, 10 Feb. 1993, public redacted version, at 3.
- 39 VSO Stenographic notes, 2 June 1993, public redacted version, at 33.
- 40 VSO Stenographic notes, 2 June 1993, public redacted version, at 33.
- 41 *Pros. v. Gotovina et al.* (3), Exhibit D01465.E 4103 (2 June 2009) (Excerpts from Mladić's diary); *see also Pros. v. Stanišić & Simatović* (3), Trial Tr. 4453-54 (23 April 2010); Dejan Anastasijević, *Beleške o beščašću* [Notes on dishonor], VREME, 3 June 2010 <http://www.vreme.com/cms/view.php?id=934124>.
- 42 Zwierzchowski & Tabeau, The 1995 War in Bosnia and Herzegovina: Census-Based Multiple System Estimation of Casualties' Undercount 17 (unpublished conference paper) (1 Feb. 2010).
- 43 VSO Stenographic notes, 12 Mar. 1993, at 26–27 (Vítomir Lukić was RS Prime Minister at the time).
- 44 VSO Stenographic notes, 12 Mar. 1993, at 39.
- 45 VSO Stenographic notes 9 (5 Dec. 1995) (comments of Milošević).
- 46 Mladić diary entry for meeting with Milošević at Karađorđevo, 20 September 1994, in Korlat, *Milošević Karadžića nazivao ludim doktorom* [Milošević called Karadžić the crazy doctor], BLIC, 29 May 2010, <http://www.blic.rs/Vesti/Tema-Dana/191546/Milosevic-Karadzica-nazivao-ludim-doktorom> [Korlat, *Milošević Karadžića nazivao ludim doktorom*].
- 47 VSO Stenographic notes 27 (2 Nov. 1994) (public redacted version).
- 48 *Milošević case* (31), Exhibit P641.9.2 2 (21 Jan. 2004) (Intercept of conversation between Milošević and Mladić, transcript and audio) (my translation).
- 49 *Milošević case* (31), Exhibit P641.9.2 2 (21 Jan. 2004).
- 50 Hum. Rts. Watch, The Croatian Army Offensive in Western Slavonia and its Aftermath (1 July 1995), <http://www.unhcr.org/refworld/country,,HRW,,HRV,,3ae6a80c1c,0.html>.
- 51 *Milošević case* (31), Exhibit P641.9.2 4 (21 Jan. 2004).
- 52 *Milošević case* (31), Exhibit P641.9.2 2 (21 Jan. 2004).
- 53 *Milošević case* (31), Exhibit P641.9.2 2 (21 Jan. 2004).
- 54 *Pros. v. Gotovina et al.* (3), Exhibit D01465.E 4097 (2 June 2009) (Excerpts from Mladić's diary). Excerpt refers to a meeting between Mladić, Milošević and others on 29 June 1995.



- 55 *Pros. v. Gotovina et al.* (3), Exhibit D01465.E 4097 (2 June 2009).
- 56 *Pros. v. Gotovina et al.* (3), Exhibit D01465.E 4098 (2 June 2009).
- 57 VSO Stenographic notes 22 (5 Aug. 1995) (public redacted version).
- 58 The account and citations in this paragraph are from the VSO Minutes, 23 Aug. 1995; no stenographic notes exist.
- 59 *See, e.g., Milošević case* (26), Exhibit 469.20, Notes from a meeting between Milosevic and Bosnian Serb leadership (17 June 2003).
- 60 VSO Minutes 2, 29 July 1995. There are no stenographic notes for this meeting.
- 61 *Pros. v. Krstić* (2), Judgment ¶ 28 (2 Aug. 2001).
- 62 *Milošević case* (144), Trial Tr. 30373 (15 Dec. 2003) (testimony of Wesley Clark).
- 63 *Milošević case* (15), Decision on Motion for Judgement of Acquittal ¶ 3 (16 June 2004) (Dissenting Opinion of Judge O-Gon Kwon).
- 64 VSO stenographic record 24-5 (9 Dec. 1992) (public redacted version).
- 65 VSO Stenographic record 56 (12 Mar. 1993).
- 66 VSO Stenographic notes 29 (2 June 1993) (public redacted version). The speaker is very likely Milošević, though the passage continues from the previous, redacted page.
- 67 VSO Stenographic notes 30 (30 Aug. 1994) (public redacted version). Milošević was here quoting with approval a German government analysis he had read.
- 68 VSO Stenographic notes 28 (2 Nov. 1994). The Contact Group, consisting of France, Germany, Italy, Russia, the United Kingdom, and the United States took over attempts to negotiate peace in Bosnia starting in 1994.
- 69 *Milošević case* (29), Exhibit P641.2 6, Statement of Hrvoje Šarinić (21 Jan. 2004) (conversation occurring on 12 Nov. 1993).
- 70 VSO Stenographic notes 22 (30 Aug. 1994) (public redacted version).
- 71 VSO Stenographic notes 24 (30 Aug. 1994) (public redacted version).
- 72 VSO Stenographic notes 30 (2 Nov. 1994) (public redacted version). Milošević was relating the comment of Krajišnik, who was not present.
- 73 VSO Stenographic notes 22 (30 Aug. 1994) (public redacted version).
- 74 VSO Stenographic notes 12 (13 Jan. 1995) (public redacted version).
- 75 VSO Stenographic notes 23 (30 Aug. 1994) (public redacted version).

- 76 Mladić diary entry for meeting with Milošević at Karađorđevo, 20 Sept. 1994, in Korlat, *Milošević Karadžića nazivao ludim doktorom*.
- 77 VSO Stenographic notes 10 (6 Dec. 1995) (comments of Milošević)
- 78 VSO Stenographic notes 13 (6 Dec. 1995) (“America saved Banja Luka. That’s what I was telling you a little while ago—we stopped the offensive on Banja Luka politically, we didn’t stop it militarily. We insisted on it. The Americans forbade Tuđman and Izetbegović from going any further and told them to stop, they threatened to bomb them! They didn’t do that publicly, but that’s what they ordered them and then they notified—us! That means they accepted our arguments and stopped the Muslims and the Croats, and that when they could have strolled into Banja Luka on buses, because they couldn’t arrive there as fast these others were running away!”).
- 79 VSO Stenographic notes, 30 Aug. 1994, public redacted version, at 25 (comments of Milošević).

## CHAPTER 26

- 1 Prelec at 360.
- 2 S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993) (on the establishment of the International Criminal Tribunal for the Former Yugoslavia).
- 3 U.N. Charter Art. 39.
- 4 *Pros. v. Tadić* (3), Motion for Interlocutory Appeal (2 Oct. 1995) [*Tadić* Motion for Interlocutory Appeal].
- 5 *Tadić* Motion for Interlocutory Appeal.
- 6 *Tadić* Motion for Interlocutory Appeal ¶ 13.
- 7 *Tadić* Motion for Interlocutory Appeal ¶ 46.
- 8 See, e.g., GOLDSTONE, FOR HUMANITY 77 (noting that his first press conferences as ICTY prosecutor “proved a difficult start to my new relationship with the international media, which effectively had written off the International Criminal Tribunal for the former Yugoslavia (ICTY) as the ‘fig leaf’ of the international community established to hide its shame for inaction in the former Yugoslavia, particularly in Bosnia.”). See generally HOLBROOKE, TO END A WAR (accounting the events leading up to the Dayton Negotiations).

- 9 See, e.g., Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999).
- 10 2 TRIAL OF THE MAJOR WAR CRIMINALS 153–54.
- 11 See generally Ku & Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).
- 12 See generally ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA*; HONIG & BOTH, *SREBRENICA: RECORD OF A WAR CRIME*.
- 13 *Pros. v. Karadzic & Mladic* (2), Indictment (24 July 1995).
- 14 *Pros. v. Karadzic & Mladic* (1), Indictment (14 Nov. 1995).
- 15 Goldstone has written with respect to the *Srebrenica* indictment that “[w]hen it was announced that the Dayton talks were to take place we decided to hasten the indictment. That we succeeded in issuing it when we did remained a coincidence.” GOLDSTONE, *FOR HUMANITY* 108.
- 16 Goldstone, *United Nations’ War Crimes Tribunals*, 12 CONN. J. INT’L L. 227, 233 (1996).
- 17 Goldstone, *United Nations’ War Crimes Tribunals*.
- 18 See Bassiouni at 100-01.
- 19 HOLBROOKE, *TO END A WAR* 98.
- 20 HOLBROOKE, *TO END A WAR* 98.
- 21 See, e.g., HOLBROOKE, *TO END A WAR* 238–39 (“Events had given [Tudman] a central role in the peace process. Some critics charged that we had made a deliberate decision to overlook Croatia’s often brutal policies towards Muslims and Serbs in exchange for Zagreb’s support of a peace agreement in Bosnia. The truth, however, was different: we did not empower Tudjman, the situation did.... Tudjman’s ability to both prevent a Bosnia agreement and to threaten another war was his primary leverage over Milosevic.”).
- 22 See generally Akhavan, *Beyond Impunity*, 95 AM. J. INT’L L. 7, 13–8 (2001).
- 23 Akhavan, *Beyond Impunity* 7, 30.
- 24 Akhavan, writing in 2001, is indeed similarly optimistic regarding the political effects of Milošević’s indictment. Akhavan, *Beyond Impunity* 16–19.
- 25 Del Ponte at 136; PONTE & SUDETIC, *MADAME PROSECUTOR* 90 (“To my surprise, I learned that the investigations had produced scant progress

- in linking crimes in Croatia and Bosnia with Milošević, and other high-ranking military and police officials in Belgrade.”).
- 26 DEL PONTE & SUDETIC, MADAME PROSECUTOR 90 (noting that, in the view of both her then-deputy and her chief of investigations, her office “had neither sufficient time nor resources to chase evidence on Milošević when it was so unlikely he would ever end up in The Hague.”)
  - 27 Simons, *Proud but Concerned: Tribunal Prosecutor Leaves*, N.Y. TIME, 15 Sept. 1999, at A3.
  - 28 Press Release, Statement by Justice Louise Arbour, Prosecutor ICTY, JL/PIU/404-E (27 May 1999), <http://www.icty.org/sid/7764> [Arbour Press Release].
  - 29 Arbour Press Release.
  - 30 Arbour Press Release.
  - 31 S.C. Res. 1244, U.N. Doc. S/RES/1244 (10 June 1999).
  - 32 Press Release, Statement by Justice Louise Arbour, Prosecutor ICTY.
  - 33 TRIAL OF THE MAJOR WAR CRIMINALS 99.
  - 34 See, e.g., Klarin, *Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT’L CRIM. J. 89 (2009) (noting that the “the popularity of the ICTY in the former Yugoslavia is inversely proportional to the number of accused that come from these countries, entities, and particularly ethnic communities.”) (internal quotes omitted). Klarin points in particular to the results of one 2007 poll showing that “only 7% of Serbians believed that the ICTY was unbiased when it tried Serbs” and “as many as 63% thought there were ‘too many’ Serb indictees (compared with other ethnic groups).” *Id.*

## CHAPTER 27

- 1 See BASS, STAY THE HAND OF VENGEANCE (lucid accounting of the liberal thinking that underpins the creation of international criminal tribunals).
- 2 ORENTLICHER, SHRINKING THE SPACE FOR DENIAL 20, [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/serbia\\_20080520/serbia\\_20080501.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf).
- 3 Milošević case (61), Trial Tr. 1-215 (12, 13 Feb. 2002).



- 4 Milošević case (61), Trial Tr. 1-215 (12, 13 Feb. 2002).
- 5 The term is taken from Wilde, *Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy*, 31 J. LATIN AM. STUD. 473 (1999).
- 6 Notably, on the “trials of cooperation,” see PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS (2008).
- 7 Belgrade Centre for Human Rights, *Ljudska prava u Jugoslaviji 2002*, at 455–57 (Tatjana Papić & Vojin Dimitrijević eds., 2003). The performance of the Prosecution received 1.7 and the chances of Milošević getting a fair trial 1.9 out of five. Half of the respondents believed Milošević deserved a four or five out of five for his self-defense. These results corroborated those found by the Strategic Marketing agency, cf. footnote 6. See also Bieber.
- 8 Luković, *Opšta amnestoza*, FERAL TRIB., 17 Aug. 2002, in *Tačka razlaza*, 16 HELSINŠKE SVESKE 179–82 (2003) [Luković, *Opšta amnestoza*].
- 9 Luković, *Opšta amnestoza* 181. All translations are mine.
- 10 Quoted in Luković, *Opšta amnestoza* 182.
- 11 Matić, *Tko relativizira zločin*, FERAL TRIB., 27 Aug. 2002, in *Tačka razlaza*, 16 HELSINŠKE SVESKE 183–84 (2003) [Matić, *Tko relativizira zločin*].
- 12 Matić, *Tko relativizira zločin* 184.
- 13 Matić, *Tko relativizira zločin* 184.
- 14 Žarković, *Dehelsinkizacija gospodje Biserko*, VREME, 1 Aug. 2002.
- 15 Žarković, *Dehelsinkizacija gospodje Biserko*, VREME, 1 Aug. 2002.
- 16 Kandić, *Neprijatelj u Srbiji—otvorenost, snaga i integritet nekoliko žena*, VREME, 22 Aug. 2002.
- 17 Kandić, *Neprijatelj u Srbiji—otvorenost, snaga i integritet nekoliko žena*, VREME, 22 Aug. 2002. See also Stojanović, *Otrovna značenja*, VREME, 5 Sept. 2002.
- 18 Srđa Popović, interview in *Monitor* (Montenegro), carried in VREME, 3 Oct. 2002, at 65.
- 19 Slapšak, *Neprijatelji nezavisnih medija*, VREME, 22 Aug. 2002.
- 20 Cerović, *Tvrđoglava selektivnost*, VREME, 12 Sept. 2002.
- 21 Cerović, *Grešna strast*, VREME, 21 Feb. 2002.
- 22 Stefanović, *Spuno žara i na brzinu*, VREME, 29 Aug. 2002.

- 23 Popović, *Kapitulacija pred zločinom*, VREME, 5 Sept. 2002.
- 24 Popović, *Dosta je bilo muljanja*, VREME, 3 Oct. 2002.
- 25 Popović, *Kapitulacija pred zločinom*.
- 26 Popović, *A šta su radili drugi?*, VREME, 19 Sept. 2002 [Popović, *A šta su radili drugi?*].
- 27 Popović, *A šta su radili drugi?*.
- 28 Popović, *A šta su radili drugi?*.
- 29 D. I., *Teškoba pred zločinom*, REPUBLIKA, 1–31 Oct. 2002.
- 30 Cerović, *Biciklisti nisu krivi*, VREME, 26 Sept. 2002.
- 31 Cerović, *Tvrdoglava selektivnost*, VREME, 12 Sept. 2002.
- 32 Cerović, *Bez dobrog kraja*, VREME, 14 Nov. 2002.
- 33 Milka Tadić-Mijović, interview with Stojan Cerović, *Opasna priča o kolektivnoj krivici*, MONITOR, 20 Sept. 2002.
- 34 Rajić, *Pravo na treće mišljenje*, VREME, 29 Aug. 2002.
- 35 Cerović, *Tužilačka revnost*, VREME, 29 Aug. 2002.
- 36 Cerović, *Bez dobrog kraja*.
- 37 Cerović, *Tužilačka revnost*.
- 38 Cerović, *Bez dobrog kraja*.
- 39 Cerović, *Biciklisti nisu krivi*.
- 40 Cerović, *Tvrdoglava selektivnost*.
- 41 Cerović, *Bez dobrog kraja*.
- 42 See, e.g., Kocijan, *Filmom na film—optužbom na optužbu*, DANAS, 16–17 Feb. 2002, <http://www.danas.co.yu/20020216/vikend2.htm>.
- 43 Kazimir, *Moj odgovor njima*, VREME, 15 Aug. 2002.
- 44 This was the title of the book on the *Vreme* debate, published in Belgrade in 2003. *Tačka razlaza*, 16 HELSINŠKE SVESKE (2003).
- 45 *Apel*, 15 Apr. 1999, reproduced in VREME, 17 Oct. 2002 [*Apel*, in VREME].
- 46 *Apel*, in VREME.
- 47 *Apel*, in VREME.
- 48 *Apel*, in VREME.
- 49 *Apel*, in VREME.
- 50 *Apel*, in VREME.
- 51 Stojanović, *Otrovna značenja*, VREME, 5 Sept. 2002. The letter was first brought up by Nataša Kandić in *Neprijatelj u Srbiji—otvorenost, snaga*

- i integritet nekoliko žena*, VREME, 22 Aug. 2002.
- 52 Kandić, *Neprijatelj u Srbiji*. She also noted that the writer Filip David and the ethnologist Ivan Čolović had reacted the same way.
- 53 Kandić, *Neprijatelj u Srbiji*.
- 54 Popović, *Gnusni zločinci su među nama*, interview in Sarajevo's B-H DANI, reproduced in VREME, 3 Oct. 2003.
- 55 Miroslav Višić, *Bombardovanje za naše dobro*, VREME, 5 Sept. 2002.
- 56 Todorović, *Patriotizam pod okriljem diktatora*, VREME, 7 Nov. 2002.
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## CHAPTER 30

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## CHAPTER 31

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- 38 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of Sept. 18, 2004, ¶ 518 (Jan. 25, 2005). For criticism, see Lowenstein & Kostas, *Divergent Approaches to Determining Responsibility for Genocide*, 5 J. INT'L CRIM. JUST. 839, 847–48 (2007).
- 39 *Pros. v. Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest of July 12, 2010 (ICC Pre-Trial Chamber). No legal proceedings against Sudan are currently pending before any international court.
- 40 See, e.g., Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 602 (2007).
- 41 See, e.g., U.N. Dept. of Public Information, *Security Council Approves Trial Transfer of Former Liberian President Charles Taylor to Netherlands*, 16 June 2006, <http://www.un.org/News/Press/docs/2006/sc8755.doc.htm> (“the Special Court, as well as newly-elected Liberian President Ellen Johnson-Sirleaf, feared that Taylor’s presence in the countries where he allegedly fomented uprisings during the 1990s could shatter the fragile peace that was taking hold in the long-troubled West African region”).
- 42 See, e.g., VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE AND INTEGRATION AFTER COMMUNISM* 253 (describing Croatia’s pursuit of war criminals as linked to its bid for EU membership).
- 43 See, e.g., MERRIT, *DEMOCRACY IMPOSED: US OCCUPATION POLICY AND THE GERMAN PUBLIC*, at 210 (describing self-perceptions of the local population in Germany as victims of Nazism, who also expressed wishes to finish accountability processes as soon as possible in order to return to normalcy).
- 44 *Bosnian Genocide*, Application Instituting Proceedings (20 Mar. 1993); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Yugoslavia*) 1999 I.C.J. 118, (2 July 1999), <http://www.icj-cij.org/docket/files/118/7125.pdf>.

- 45 Erlanger, *Yugoslav Chief Says Milošević Shouldn't Be Sent to The Hague*, N.Y. TIME, 3 Apr. 2001.
- 46 See, e.g., Dimitrijevic, *Serbia after the Criminal Past: What Went Wrong and What Should Be Done*, 2 INT'L J. TRANSITIONAL JUSTICE 5, 11 (2008); McMahon & Forsythe, *ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics*, 30 HUM. RTS. Q. 412, 418 (2008).
- 47 Conference of the Italian Political Science Association, 2008, Tipaldou, *International Intervention in Serbia and Its Effects on the Country's Democratization* 19 (2008) (and noting, at 16, that "[a]nother humiliation factor for Serbian society is the ICTY").
- 48 Erlanger, *Yugoslav Chief Says Milošević Shouldn't Be Sent to The Hague* ("Yugoslavia will investigate war crimes and help The Hague to do so, [Koštunica] said, and Mr. Milošević should be brought to trial on war crimes charges, too—but before domestic courts").
- 49 In her book, Del Ponte quotes Đinđić as promising to transfer Milošević to the ICTY regardless of the legal niceties. CARLA DEL PONTE, MADAME PROSECUTOR 104 ("I will deliver Milošević to The Hague, even if it means kidnapping him").
- 50 PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 67.
- 51 DEL PONTE, MADAME PROSECUTOR 117 ("the continuing presence of Milošević in Serbia was a destabilizing factor").
- 52 WOEHLER, CONDITIONS ON U.S. AID TO SERBIA, CRS REPORT TO CONGRESS, RS21686, at 2 (2008) ("Secretary of State Colin Powell warned that U.S. support for an international aid conference for Serbia would depend on Milošević's delivery to the Tribunal. Milošević was delivered to the Tribunal in The Hague on June 28, 2001, one day before the donors conference").
- 53 PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 73 ("International pressure would continue, but it would come in bursts, thus enabling Serbian authorities to delay additional transfers until pressure mounted and financial inducements were offered") and 74 ("The tribunal was also rebuffed when it came to securing archival evidence and access to insider witnesses").
- 54 See text accompanying note 91 (concerning effects on the burden of proof of the Rule 98bis Decision).
- 55 PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 152.



- 56 See *id.* at 151; *Bosnian Genocide*, Oral Pleadings ¶¶ 58–59, 8 May 2006, ICJ Doc. CR 2006/43.
- 57 Letter by Del Ponte to Svilanović, 24 May 2003, *quoted in* DEL PONTE, MADAME PROSECUTOR 200 (“I am prepared to confirm my commitment that the OTP shall support in general terms the application of Serbia and Montenegro for protective measures in respect to those documents or parts of documents of the [Supreme Defense Council] records from the time of Z[oran] Lilić’s Presidency (1993–1997), for which the Government believes such measures are required”). See also *Milošević case* (77), Second Decision on Admissibility (23 Sept. 2004); *Milošević case* (34), First Decision on Admissibility (23 Sept. 2004). Although she initially encouraged the FRY to apply for protective measures, Del Ponte suggests that the protective measures approved by the Chamber were excessively broad in scope. DEL PONTE, MADAME PROSECUTOR 202. Hartmann claims that the Prosecution challenged the scope of the protective measures, but to no avail. HARTMANN, PEACE AND PUNISHMENT 116.
- 58 DEL PONTE, MADAME PROSECUTOR 202. The initial Trial Chamber decision on protective measures does not appear on the ICTY’s Web site.
- 59 See, e.g., Wedgwood, *Strange Case of Florence Hartmann*, THE AMERICAN INTEREST ONLINE, July–Aug. 2009 (“Belgrade’s asserted basis for the black-out request was avowedly to avoid justice in another court—fearing that the pending suit for civil damages brought by Bosnia against Serbia under the Genocide Convention in the International Court of Justice might be strengthened by the revelation of this evidence”); HARTMANN, PEACE AND PUNISHMENT 119–20.
- 60 Hartmann, *Vital Genocide Documents Concealed*, 21 Jan. 2008, [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2341](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2341).
- 61 *Bosnian Genocide*, Oral Pleadings ¶ 59.
- 62 *Bosnian Genocide* ¶ 206 (“the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents”).
- 63 *Bosnian Genocide* ¶ 206. (“[The Court] has not failed to note the Applicant’s [Bosnia’s] suggestion that the Court may be free to draw its own conclusions”). For criticism, see *Bosnian Genocide*,



declaration by Judge Bennouna, at 3, and dissenting opinion of Judge ad hoc Mahiou, ¶¶ 56–57. *See also* Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 *FORDHAM INT’L L.J.* 871, 897 (2008) (“The Court’s handling of Bosnia’s request that Serbia be required to disclose such vital materials was, to say the least, utterly strange”).

64 *Bosnian Genocide* ¶ 206. For criticism, see *Bosnian Genocide*, dissenting opinion of Judge Al-Khasawneh ¶ 35 (“The reasoning given by the Court... is worse than its failure to act”).

65 *Bosnian Genocide* ¶ 376 (“the Applicant has not established the existence of that intent [to commit genocide] on the part of the Respondent...”), ¶ 388 (“In the absence of evidence to the contrary, those officers [Mladic and others] must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY”), ¶ 395 (“The Court now turns to the question whether the ‘Scorpions’ were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this”), and ¶ 412 (“The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale... It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control”).

66 DEL PONTE, MADAME PROSECUTOR 208.

67 *Bosnian Genocide*, Oral Pleadings ¶ 19, 18 Apr. 2006, ICJ Doc. CR 2006/30 (Mr. van den Biesen, Bosnia-Herzegovina); Hartmann, *Vital Genocide Documents Concealed* (“If the ICJ had possessed evidence that Serbia was ‘in control’ of the Republika Srpska authorities or of the Bosnia Serbian Army, the Court would have not cleared Serbia of genocide at Srebrenica. Many believe that the transcripts or minutes of meetings of Serbia’s Supreme Defense Council (SDC)—the body in charge of the nation’s overall strategic goals and of the Yugoslav army—contain such evidence”). *But see* Várady at 461 (“[I]t is indeed conceivable, that that the ‘state secrets’ contained information that could have jeopardized the position of Serbia before the ICJ—but there are other plausible explanations as well.”).

- 68 DEL PONTE, MADAME PROSECUTOR 356–57. *See also* Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 FORDHAM INT’L L.J. 911, 931 (2008); Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment*, 5 J. INT’L CRIM. JUST. 889, 893 (2007).
- 69 Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law* 627. *See also infra* note 90 (discussing the *Pulp Mills* case).
- 70 *See* Backer, *Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT’L L. REV. 509, 535 (2003) (“The doctrine of personal responsibility for communal acts is thus an inversion for the protection of the community. The leader is sacrificed so the community may continue... Slobodan Milošević... will be punished so that Serbia may continue”).
- 71 *Cf.* Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT’L L. 669, 680 (2007) (“Compromise of that sort is inevitable in proceedings of such magnitude”).
- 72 *See* Luban, *Timid Justice: ICJ Should Have Been Harder on Serbia*, SLATE, 15 Feb. 2007. Gattini allocates some of the blame to Bosnia’s legal teams, who allegedly did not pursue the matter vigorously enough. Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment* 892–93.
- 73 *Bosnian Genocide* ¶ 273 (citing the 2004 Decision on Motion for Judgment of Acquittal, which prima facie established that killing and torture occurred in Luka Camp), ¶ 315 (relying on evidence brought before the ICTY during the *Milošević* proceedings to establish mistreatment of prisoners in Manjača Camp), and ¶ 339 (describing evidence establishing extensive attacks by Serbs against Muslim mosques, archives, and libraries).
- 74 *Bosnian Genocide* ¶ 371.
- 75 *See*, in this regard, *Bosnian Genocide*, Dissenting opinion of Judge Al-Khasawneh ¶ 42 (“That the ICTY has not found genocide based on patterns of conduct in the whole of Bosnia is of course not in the least surprising. The Tribunal only has jurisdiction to judge the individual criminal liability of particular persons accused before it, and the

relevant evidence will therefore be limited to the sphere of operations of the accused”).

- 76 For a criticism of the Court’s timid approach to inferring intent from the facts, see *Bosnian Genocide*, dissenting opinion of Judge Al-Khasawneh ¶ 41 (“what other inference is there to draw from the overwhelming evidence of massive killings systematically targeting the Bosnian Muslims than genocidal intent?”). Indeed, it looks as if the ICJ was even less willing to infer genocidal intent than the ICTY has been. See, e.g., *Pros. v. Jelisić* (2), Judgment ¶ 47 (5 July 2001). See also Groome, *Adjudicating Genocide*: 943 (“The ICJ’S effective disregard of pattern evidence marks an important methodological departure from the ICTY trial chambers, which have endorsed the importance of such evidence”).
- 77 *Bosnian Genocide* ¶ 372.
- 78 The FRY has also relied on the lack of ICTY genocide indictments as a defense against the claim presented by Croatia. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections of Federal Republic of Yugoslavia, at 115 (1 Sept. 2002).
- 79 *Bosnian Genocide* ¶ 182.
- 80 For a criticism of the limited fact-finding faculties of the ICJ, see, for example, *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), dissenting opinion of Judges Al-Khasawneh and Simma ¶ 4 (20 Apr. 2010) (“The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.”). See also Schwebel, *Three Cases of Fact-Finding before the International Court of Justice*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 1 (Lillich ed.); RIDDELL & PLATT, *EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 416.
- 81 See text accompanying note 92.
- 82 For a strong criticism of the Court’s willingness to reach factual findings on the basis of Prosecutorial decisions to reduce charges, see Alvarez, *Burdens of Proof—Note from the President*, 23 (2) ASIL NEWSLETTER 1, 7 (2007) (“The Court’s conclusion that these actions by ICTY prosecutors are probative of the absence of a concerted genocidal plan is nothing short of astonishing”). See also *Bosnian*



*Genocide*, dissenting opinion of Judge Al-Khasawneh ¶ 42. Hartmann’s criticism of the Prosecution’s changing approach to prosecuting genocide is relevant here.

83 *Bosnian Genocide* ¶ 408.

84 *Bosnian Genocide* ¶ 412.

85 *Bosnian Genocide* ¶ 423. For a criticism of this specific holding, see *Bosnian Genocide*, Declaration of Judge Keith ¶ 15.

86 *Bosnian Genocide* ¶¶ 462–43. For a criticism, see Milanović, *State Responsibility for Genocide* 690–91.

87 See Groome, *Adjudicating Genocide* 964 (“The ICJ was well aware of the relevance of Milošević’s state of mind. As president of the respondent country during the relevant period, the question of whether he possessed the *dolus specialis* of genocide was perhaps the central question of the ICJ’s inquiry”).

88 See *supra* notes 66–68.

89 See Groome, *Adjudicating Genocide* 964 (“In view of the ICJ’s demonstrable reliance on ICTY jurisprudence, it is certain that the ICJ would have placed similar reliance on a final judgment in the *Milošević* case if his death had not terminated the proceedings”).

90 *Milošević case* (1) 98bis Decision ¶¶ 288, 298, 309 (16 June 2004). One of the three judges, Judge Kwon, dissented from the decision relating to Milošević’s intentional participation in genocide. For additional criticism, see Groome, *Adjudicating Genocide* 975–76.

91 But see Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment* 900 (“The Court was therefore right in making plain that only the findings of fact arrived at after a painstaking adversarial process, such as those made by Trial Chambers, and especially if confirmed on appeal, should ‘in principle’ be accepted ‘as highly persuasive’”). Cf. Waters at 308–10 (taking the contrary view), and at 311 (discussing a view similar to mine advanced by Dermot Groome, the lead prosecutor for the *Bosnia* phase in *Milošević*).

92 See Gattini, *Evidentiary Issues in the ICJ’s Genocide Judgment* 895. Note however that Gattini argues in favor of adopted a “beyond reasonable doubt” standard also in inter-state cases raising serious allegations.



- 93 For some support, see Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility* 630.
- 94 See Groome, *Adjudicating Genocide* 975.

## CHAPTER 32

- 1 Tipaldou, *International Intervention in Serbia and Its Effects on the Country's Democratization* 19 (2008) (cited in Shany at 449 and 582, n. 47).
- 2 Grubač, *Hag u očima Beograda* [*The Hague in the Eyes of Belgrade*], GLASNIK ADVOKATSKE KOMORE VOJVODINE 439–52 (2001).
- 3 Grubač, *Hag u očima Beograda* [*The Hague in the Eyes of Belgrade*], GLASNIK ADVOKATSKE KOMORE VOJVODINE 439–52 (2001) (noting the ICTY's suggestions to proceed without implementing legislation, and also, in footnote 7, that similar implementing legislation had been enacted inter alia in Bosnia, Croatia, Australia, New Zealand, the UK, Ireland, the USA., Sweden, Finland, Norway, Denmark, Austria, the Netherlands, Germany, France, Hungary, Italy, Spain, Romania, and Greece.)
- 4 CONST. SFRY Art. 17.
- 5 CRIMINAL CODE OF THE SFRY, OFFICIAL GAZETTE SFRJ No. 44, Art. 484 ¶ 1–7 (8 Oct. 1976).
- 6 See Comm. on Extradition & Hum. Rts., *Taipei Conference*, 68 INT'L ASS'N REP. CONF. 132, 150 (1998) (“The term ‘extradition’ is carefully avoided in order to distinguish this form of international co-operation from ordinary extradition.” and describing the response of various states, such as Australia, Austria, Belgium, the U.K. and the United States, to “extradition” to ad hoc criminal tribunals including the ICTY and the ICTR).
- 7 Uredba o postupku saradnje sa Međunarodnim krivičnim tribunalom u Hagu [Decree on Conducting Cooperation with the International Criminal Tribunal for the Former Yugoslavia], SLUŽBENI LIST SRJ 30/2001 (23 June 2001) (entered into force 24 June 2001, amended No. 33/2001, 37/2001, 70/2001, and 5/2002).
- 8 See *Constitution Watch: A Country-by-Country Update on Constitutional Politics in Eastern Europe and the Ex-USSR*, 11 E.

- EUR. CONST. REV. 2, 53 (2002).
- 9 CONST. SERBIA Art. 135 (1990).
- 10 CONST. SERBIA Art. 135 (2) (“If acts of the agencies of the Federation or acts of the agencies of other republics, in contravention of the rights and duties it has under the Constitution of the Socialist Federal Republic of Yugoslavia, violate the equality of the Republic of Serbia or in any other way threaten its interests, without providing for compensation, the republic agencies shall issue acts to protect the interests of the Republic of Serbia.”).
- 11 ICJ, *Croatian Genocide* (Croatia v. Yugoslavia) (2 July 1999), <http://www.icj-cij.org/docket/files/118/7125.pdf>; ICJ, *Bosnian Genocide* ¶ 73 (26 Feb. 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf>.
- 12 See, e.g., *Pros. v. Blaškić* (1), IT-95-14, Decision on the Objection to the Issuance of *Subpoenae Duces Tecum* ¶¶ 124–49 (18 July 1997); see also Jacob Katz Cogan, *The Problem of Obtaining Evidence from International Criminal Courts*, 22 HUM. RTS. Q. 404 (2000) (outlining Croatia’s reluctance); Laura Moranchek, *Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT’L L. 447 (2006) (discussing United Kingdom’s, France’s, and United States’ reluctance to cooperate).
- 13 U.N.G.A., Letter Dated 24 Nov. 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General, U.N. Doc A/48/659, S/26806 (26 Nov. 1993).
- 14 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Written Statement of the Republic of Croatia of Its Observations and Submissions on the Preliminary Objections Raised by the Federal Republic of Yugoslavia (Serbia and Montenegro). Vol. 1 ¶¶ 3.19–3.41 (29 Apr. 2003).
- 15 ICJ, *Bosnian Genocide*, Judgment, (Feb. 2007).

## CHAPTER 33

- 1 See Rule 98bis Decision ¶¶ 117–315.

- 2 *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, & Lukić* (3), Judgement Vol. 1-4 (26 Feb. 2009) [*Milutinović et al.*, and particular document with date].
- 3 *See Pros. v. Martić* (4), Judgment ¶¶ 92–215 (8 Oct. 2008) (discussing the link between Belgrade and the RSK leadership and indicating a key role for Milošević in the JCE in Croatia that logically would have led to his conviction). *See also Pros. v. Babić* (3), Sentencing Judgment (29 June 2004); *Pros. v. Babić* (2), Judgment on Sentencing Appeal (18 July 2005).
- 4 *See Pros. v. Milutinović, et al.*, IT-05-87-T, Judgement Summary 3 (26 Feb. 2009).
- 5 *Milutinović, et al.*, Judgment Vol. 3 ¶ 427 (26 Feb. 2009) (“the Chamber is of the view that Šainović was indeed one of the closest and most trusted associates of Slobodan Milošević both in 1998 and 1999.”).
- 6 *Milutinović, et al.*, Judgment Vol. 3 ¶ 427 (26 Feb. 2009) (“It was this relationship that led to him undertaking a leading role during the Joint Command meetings and various other meetings involving VJ and MUP officials. It was also this relationship that led to him becoming the Chairman of the Commission for Co-operation with the KVM [Kosovo Verification Mission]. These various roles in turn enabled him to be a political co-ordinator of both civilian and military activities in Kosovo and somebody who had a decision-making role with respect to the province.”).
- 7 *Milutinović, et al.*, Judgment Vol. 3 ¶ 708 (26 Feb. 2009) (“Vasiljević testified that he believed that in 1999 Pavković often circumvented the chain of command by going directly to Milošević without the knowledge or authorisation of Ojdanić. He recounted his own experience of this by-passing, stating that when Vasiljević and Ojdanić went to visit Milošević in mid-June 1999 at Beli Dvor in Belgrade they saw Pavković leaving the building. According to Vasiljević, Ojdanić himself told him that Pavković was meeting privately with Milošević without Ojdanić’s knowledge, and was not reporting back to him as his superior officer. Ojdanić complained to Milošević, who replied that it was not an official meeting.”). Similarly, Vladimir Lazarević, the former Commander of the Priština Corps was given 15 years, with the Chamber noting that unlike

Pavković, Lazarević did not take part in the decision-making process about future actions in Kosovo at meetings with Milošević and other high-ranking officials before and during the NATO campaign.

*Milutinović, et al.*, Judgment Vol. 3 ¶ 918 (26 Feb. 2009). The fourth Accused to be sentenced, Sreten Lukić, the former chief of the SDB in Kosovo, was given 22 years; the judges found that, as head of the MUP in Kosovo, Lukić, had attended a number of such meetings, which qualified him as “an important member” of the joint criminal enterprise. *Milutinović, et al.*, Judgment Vol. 3 ¶ 1131 (26 Feb. 2009).

- 8 *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, & Lukić* (4), Judgment Vol. 3 ¶¶ 130–31 (26 Feb. 2009) (“the Chamber is of the view that, even though in theory Milutinović still had a formal role in the command structure of the VJ, the real commanding at that point was done by the Supreme Commander, Slobodan Milošević, using the decision of the SDC issued on 4 October and approving for defence of the country in case of an attack by the NATO.”).
- 9 *Pros. v. Babić* (3), Sentencing Judgment (29 June 2004); *Pros. v. Babić* (2), Judgment on Sentencing Appeal (18 July 2005).
- 10 *Pros. v. Martić* (3), Judgment (12 June 2007) [*Martić case*, Judgment].
- 11 *Martić case*, Judgment ¶ 448.
- 12 *Martić case*, Judgment ¶ 446.
- 13 *Secret Forces Protected “Serbian Interests Outside Serbia,”* SENSE TRIBUNAL, 9 June 2009, [http://www.sense-agency.com/icty/secret-forces-protected-%E2%80%98serbian-interests-outside-serbia%E2%80%99.29.html?cat\\_id=1&news\\_id=11274](http://www.sense-agency.com/icty/secret-forces-protected-%E2%80%98serbian-interests-outside-serbia%E2%80%99.29.html?cat_id=1&news_id=11274).
- 14 *See Stanišić & Simatović* (4), Revised Second Amended Indictment (15 May 2006).
- 15 *See Milošević case* (55), Prosecution Exhibit 390; *Milošević case* (9), Corrected Transcript of Video (19 Feb. 2003). The video was shown during the testimony of Dragan Vasiljković, aka Captain Dragan, in February 2003 at the *Milošević* trial.
- 16 *See Stanišić & Simatović case* (8), Second Amended Indictment ¶ 60 (20 Dec. 2005).
- 17 Paragraphs 55 to 65 were deleted from the December 2005 indictment. *See Stanišić and Simatović case* (7), Revised Second Amended Indictment (15 May 2006).



- 18 See *Stanišić & Simatović case* (8), Second Amended Indictment ¶¶ 63–65; *Milošević case* (148), Trial Tr. 40218-319 (1 June 2005). The same killings were later characterized as a separate incident from the Srebrenica events. See *Stanišić and Simatović case* (7), Revised Second Amended Indictment; *Stanišić & Simatović case* (5), Prosecution Notice of Filing of Third Amended Indictment (10 July 2008).
- 19 See *Milošević case* (64), Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal ¶¶ 83–198 (3 May 2004).
- 20 *Milošević case* (137), Trial Tr. 12918:13-12920:3 (18 Nov. 2002).
- 21 *Stanišić & Simatović case* (1), Decision on Stanišić Defence’s Motion on the Fitness of the Accused to Stand Trial (27 Apr. 2006).
- 22 *Stanišić & Simatović case* (1), Decision on Stanišić Defence’s Motion on the Fitness of the Accused to Stand Trial ¶ 302 (27 Apr. 2006).
- 23 HARTMANN, PAIX ET CHÂTIMENT, LES GUERRES SECRÈTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES (in particular, Chapter II “Les coulisses du procès de Slobodan Milošević”).
- 24 *Stanišić & Simatović case* (6), Prosecution Opening Statements, Trial Tr. 888-1104 (28–29 Apr. 2008). This was the Prosecution’s first opening statement; due to a long break in the case, the Prosecution was allowed to present a second opening statement when the trial resumed on 9 June 2009.
- 25 *Pros. v. Perišić* (2), Revised Second Amended Indictment (5 Feb. 2008) [*Perišić case*]. Following the same theory, Perišić was also indicted for one shelling incident in Zagreb in May 1995. See *id.* at ¶¶ 47–54.
- 26 *Pros. v. Perišić* (4), Trial Tr. 341-423 (2 Oct. 2008) (Prosecution Opening Statement) [Opening Statement]. The description of the Prosecution case is based on the opening statement.
- 27 *Perišić case*, Opening Statement.
- 28 *Perišić case*, Opening Statement.
- 29 *Perišić case*, Opening Statement. See also *Pros. v. Perišić* (2), Revised Second Amended Indictment (5 Feb. 2008).
- 30 *Pros. v. Krstić* (1), Appeal Judgment (19 Apr. 2004) [*Krstić case*, Appeal Judgment]. See also *Pros. v. Popović, Beara, Nikolić*,

- Borovčanin, Miletić, Gvero, Pandurević*. Judgment Vol. 1 & 2 (10 June 2010) [jointly, *Srebrenica Judgments* ].
- 31 *Pros. v. Perišić* (2), Revised Second Amended Indictment ¶ 60.
  - 32 *Krstić case*, Appeal Judgment.
  - 33 *Krstić case*, Appeal Judgment ¶ 38.
  - 34 *Pros. v. Perišić* (6), Trial Tr. 9461-532 (2 Sept. 2009) (testimony of protected witness MP443).
  - 35 *Pros. v. Perišić* (3), Judgment ¶¶ 1835–40 (6 Sept. 2011) [*Perišić case*, Judgment].
  - 36 *Pros. v. Perišić*, Judgment ¶ 1836.
  - 37 *Pros. v. Perišić*, Judgment ¶¶ 1640, 1777.
  - 38 *Pros. v. Perišić*, Judgment ¶ 1755.
  - 39 *Pros. v. Perišić*, Judgment ¶¶ 1757–69.
  - 40 *Pros. v. Perišić*, Judgment ¶¶ 1770–79.
  - 41 *Pros. v. Perišić*, Judgment ¶¶ 1448–49, 1484–87, 1492, 1522–79.
  - 42 *Milošević case* (64), Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal ¶ 366 (3 May 2004).
  - 43 *Pros. v. Perišić*, Opening Statement of the Prosecution 352:14–22.
  - 44 *Pros. v. Perišić*, Revised Second Amended Indictment ¶ 60.
  - 45 *Pros. v. Perišić*, Opening Statement of the Prosecution 379.
  - 46 *Pros. v. Perišić*, Opening Statement of the Prosecution 379.
  - 47 ICJ, *Bosnian Genocide*, Judgment, ¶¶ 377–415 (26 Feb. 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf>.
  - 48 *See Bosnian Genocide* ¶ 422.
  - 49 Interview with Munira Subašić, Head of the Association Mothers of Srebrenica, in Srebrenica (10 July 2009).

## CHAPTER 34

- 1 SYSTEM CRIMINALITY IN INTERNATIONAL LAW (Nollkaemper & van der Wilt eds.).
- 2 *See* Simpson, “Men and Abstract Entities,” *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 80 (Nollkaemper & van der Wilt eds.) (describing the view that Nuremberg and Tokyo were designed to cleanse Germany and Japan of collective guilt as “the orthodox account[;]”);

*see also* CASSESE, INTERNATIONAL CRIMINAL LAW 137 (arguing that nobody may be held accountable for criminal offenses perpetrated by other persons, as in modern criminal law the notion of collective responsibility is no longer acceptable).

- 3 International Military Tribunal at Nuremberg, Judgment and Sentences (1 Oct. 1946), *reproduced in* 41 AM. J. INT'L L. 221 (1947).
- 4 *Milošević case* (81), Trial Tr. 4:3-4:10 (12 Feb. 2002).
- 5 *See, e.g., Pros. v. Delalić et al.*, Judgment ¶ 378 (16 Dec. 1998).
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- 15 Hartmann at 472.

[16](#) Hartmann at 472.

[17](#) Hartmann at 474.



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## ***PROS. V. MILOŠEVIĆ***

NB: Documents in the trial had different case numbers. Those with the most common number are listed in the first section, *A. Milošević case*; those with other numbers are listed in the second section, *B. Pros. v. Milošević*; those with no case number and the VSO notes are listed in the third section, *C. Other documents*.

### *A. Milošević case – Documents beginning with Number IT-02-54*

- (1) 98bis Decision ¶ 4. Decision on Motion for Judgement of Acquittal (16 June 2004).
- (2) Amended Indictment “Bosnia and Herzegovina” (22 Nov. 2002).
- (3) Addendum to “Prosecution Submission in Response to the Trial Chamber’s July 19, 2004 Further Order on Future Conduct of the Trial” (6 Aug. 2004).
- (4) Addendum to “Prosecution Submission in Response to the Trial Chamber’s July 21, 2004 Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments” (6 Aug. 2004).
- (5) *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98bis (3 Mar. 2004).



- (6) *Amici curiae* Submissions on the Trial Chamber's Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments dated July 21, 2004 (27 July 2004).
- (7) Appeals Chamber Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 Nov. 2004).
- (8) Brief on the Provision of Adequate Facilities to Allow the Accused to Defend Himself (5 Mar. 2002).
- (9) Corrected Transcript of Video (V000-3533—Corrected by B-073) (19 Feb. 2003).
- (10) Decision in Relation to Severance, Extension of Time and Rest (12 Dec. 2005).
- (11) Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex (13 Dec. 2005).
- (12) Decision on Assigned Counsel Motion for Expedited Appeal against the Trial Chamber's "Decision on Assigned Counsel Request for Provisional Release" (17 Mar. 2006)
- (13) Decision on Assigned Counsel Request for Provisional Release (23 Feb. 2006)
- (14) Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 Nov. 2004).
- (15) Decision on Motion for Judgement of Acquittal, Dissenting Opinion of Judge O-Gon Kwon (16 June 2004).
- (16) Decision on Motion for Judgement of Acquittal, Separate Opinion of Judge Patrick Robinson ¶ 11 (16 June 2004).
- (17) Decision on Motions of the Defence in Pros. v. Milutinovic, Ojdanic and Sainovic for Access to Certain Confidential Filings, Trial Tr. 32831-32894 (15 Sept. 2004).
- (18) Decision on Notification of the Completion of Prosecution Case and Motion for the Admission of Evidence in Written Form (25 Feb. 2004).
- (19) Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, (1 Feb. 2002).

- (20) Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (10 Apr. 2003).
- (21) Decision on Prosecution's Motion under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal under Rule 98*bis* (5 Feb. 2004).
- (22) Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92*bis* (21 Mar. 2002).
- (23) Defense Opening Statement, Trial Tr. 248-9 (14 Feb. 2002).
- (24) Exhibit 389.8a (28 July 1992).
- (25) Exhibit 469.20, Notes from a meeting held in Dobanovci (Serbia) between Slobodan Milošević and the Bosnian Serb leadership, including Radovan Karadžić and Ratko Mladić held on August 29, 1995 (29 Aug. 1995).
- (26) Exhibit 469.20, Notes from a meeting held in Dobanovci (Serbia) between Slobodan Milosevic and the Bosnian Serb leadership, including Radovan Karadzic and Ratko Mladic held on August 29, 1995 (17 June 2003).
- (27) Exhibit P390.3, Corrected Transcript of Video 7 (19 Feb. 2003).
- (28) Exhibit P390.3a 6 (19 Feb. 2003) (Corrected Transcript of Video).
- (29) Exhibit P641.2 12 (21 Jan. 2004) (Statement of Hrvoje Šarinić).
- (30) Exhibit P641.2, Statement of Hrvoje Šarinić (26 Jan. 1991).
- (31) Exhibit P641.9.2 2 (21 Jan. 2004) (Intercept of conversation between Milošević and Mladić, transcript and audio) (Marko Prelec translation).
- (32) Exhibit P667.47.1a 5 (6 Dec. 1995) (Stenographic notes of the 47th Enlarged Session of the *Vrhovni Savet Odbrane* (Supreme Defense Council or VSO)) [VSO Stenographic Notes (with date)].
- (33) Expert Report of Audrey Helfant Budding, "Serbian Nationalism in the Twentieth Century" 53–58 (29 May 2002).
- (34) First Decision on Admissibility of Supreme Defence Council Materials (23 Sept. 2004).
- (35) Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments (21 July 2004).

- (36) IT-02-54, Prosecution Submission in Response to the Trial Chamber's July 21, 2004 "Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments" (27 July 2004).
- (37) IT-02-54-T, Further Scheduling Order on Defence Case, 2-4 (12 Feb. 2004).
- (38) Ivan Cermak's and Mladen Markac's joint motion for access to confidential testimony and documents in Prosecutor v. Slobodan Milosevic case (9 Jan. 2007).
- (39) Milosevic Amended Expert Report Audrey Budding with Endnotes, Ex. P508 (23 July 2003).
- (40) Motion Hearing, Trial Tr. 116 (11 Dec. 2001).
- (41) Oral Ruling of the Trial Chamber, Trial Tr. 14574 (18 Dec. 2002).
- (42) Order Appointing a New Presiding Judge for Trial Chamber III (26 Feb. 2004).
- (43) Order Appointing Branko Rakić as Legal Associate to the Accused, 3 (23 Oct. 2003).
- (44) Order Concerning the Preparation and Presentation of the Defence Case (17 Sept. 2003) ('September Order').
- (45) Order Granting Leave to Amend the Croatia Indictment (4 Nov. 2002).
- (46) Order Inviting the Designation of *Amicus Curiae* (23 Nov. 2001).
- (47) Order Modifying Second Order Granting Leave to Amend the Croatia Indictment (28 July 2004).
- (48) Order on Amici Curiae Request Concerning the Manner of Their Future Engagement and Procedural Directions under Rule 98bis (27 June 2003).
- (49) Order on the Amended Bosnia Indictment (21 Apr. 2004).
- (50) Order on the Modalities to be Followed by Court Assigned Counsel (3 Sept. 2004).
- (51) Order Replacing a Judge in a Case Before a Trial Chamber (10 June 2004).
- (52) Order to an *Amicus* to Prepare Written Submissions (11 Dec. 2002).

- (53) Order to Prosecution on Indictments following Rule 98*bis* Decision (20 July 2004).
- (54) Order to Registry to Provide Report Concerning Practical Facilities Available to the Accused (7 Mar. 2002).
- (55) Prosecution Exhibit 390.
- (56) Prosecution Exhibit 508.
- (57) Prosecution Motion for a Hearing to Discuss the Implications of the Accused's Recurring Ill Health (23 Sept. 2003).
- (58) Prosecution Motion to Amend the Bosnia Indictment with Confidential Annex B, Annex A (22 Nov. 2002).
- (59) Prosecution Motion under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal under Rule 98*bis* (4 Feb. 2004).
- (60) Prosecution Notification of the Completion of its Case and Motion for the Admission of Evidence in Written Form (25 Feb. 2004)
- (61) Prosecution Opening Statement, Trial Tr. 1-215 (12, 13 Feb. 2002).
- (62) Prosecution Opening Statement, Trial Tr. 25 (12 Feb. 2002).
- (63) Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98*bis* (23 Mar. 2004) (confidential).
- (64) Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98*bis* (3 May 2004).
- (65) Prosecution Submission in Response to the Trial Chamber's November 22, 2005 "Scheduling Order for a Hearing" on Severing the Kosovo Indictment (29 Nov. 2005).
- (66) Prosecution's Application for an Order Pursuant to Rule 54*bis* Directing the Federal Republic of Yugoslavia to Comply with Outstanding Requests for Assistance (13 Dec. 2002).
- (67) Prosecution's Position in Relation to Management of Trial Proceedings and the Regime for Presentation and Admission of Evidence with Comments on Issues concerning the Accused's Health (5 Apr. 2002).
- (68) Prosecution's Second Pre-Trial Brief (Croatia and Bosnia Indictments) (31 May 2002).



- (69) Prosecution's Submission of Red-Lined Versions of Indictments Pursuant to Trial Chamber "Order to Prosecution on Indictments Following Rule 98*bis* Decision" (11 Aug. 2004).
- (70) Prosecution's Submission on the Implications of the Accused's Recurring Ill-Health and the Future Conduct of the Case (29 Sept. 2003).
- (71) Public redacted version of the statement of Witness B-1455 pursuant to Rule 92*bis* (29 May 2003).
- (72) Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004).
- (73) Reasons for Decision on the Prosecution Motion concerning Assignment of Counsel (4 Apr. 2003).
- (74) Registry Report on Practical Facilities Available to Accused (18 Mar. 2002).
- (75) Scheduling Order concerning Recommencement of the Trial (25 Aug. 2004).
- (76) Scheduling Order for a Hearing 4 (22 Nov. 2005).
- (77) Second Decision on Admissibility of Supreme Defense Council Materials (23 Sept. 2004).
- (78) Submission from the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused's Health and the Length and Complexity of the Case (8 Nov. 2002).
- (79) Submission of Red-Lined Versions of Indictments Pursuant to Trial Chamber Order to Prosecution on Indictments Following Rule 98*bis* Decision (20 July 2004).
- (80) Trial Tr. 16:24-25, 18:1-6 (30 Aug. 2001).
- (81) Trial Tr. 4:3-4:10 and 10-12 (12 Feb. 2002).
- (82) Trial Tr. 8-9 (12 Feb. 2002).
- (83) Trial Tr. 8:11-12 (12 Feb. 2002).
- (84) Trial Tr. 9 (12 Feb. 2002).
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- (86) Trial Tr. 10:13-16 (12 Feb. 2002).
- (87) Trial Tr. 15:14-23 (12 Feb. 2002).
- (88) Trial Tr. 16 (12 Feb. 2002).

- (89) Trial Tr. 19:3 (12 Feb. 2002).
- (90) Trial Tr. 25 (12 Feb. 2002) (Opening statement of Geoffrey Nice).
- (91) Trial Tr. 50 (12 Feb. 2002).
- (92) Trial Tr. 64-5 (12 Feb. 2002).
- (93) Trial Tr. 195 (13 Feb. 2002).
- (94) Trial Tr. 246-47, 284 (14 Feb. 2002).
- (95) Trial Tr. 510-41 (18 Feb. 2002).
- (96) Trial Tr. 543-649 (19 Feb. 2002).
- (97) Trial Tr. 571:9-12, 572:2-4 (19 Feb. 2002).
- (98) Trial Tr. 783 (21 Feb. 2002).
- (99) Trial Tr. 1045:24-25, 1046:1, 1047:1-16, 1102:23-25, 1103:1-4, 1005:16-22 (26 Feb. 2002).
- (100) Trial Tr. 1091:4-5 (26 Feb. 2002).
- (101) Trial Tr. 1954-74 (11–12 Mar. 2002).
- (102) Trial Tr. 3377:11-3380:14, 3396 (18 Apr. 2002).
- (103) Trial Tr. 3398 (18 Apr. 2002).
- (104) Trial Tr. 3414:17-19 (18 Apr. 2002).
- (105) Trial Tr. 3420-21 (18 Apr. 2002)
- (106) Trial Tr. 3425:23-25 (18 Apr. 2002).
- (107) Trial Tr. 3434:4-5 (18 Apr. 2002).
- (108) Trial Tr. 3437:10-12 (18 Apr. 2002).
- (109) Trial Tr. 3455:13-14 (18 Apr. 2002).
- (110) Trial Tr. (18–19 Apr. 2002).
- (111) Trial Tr. 3659:7-16 (24 Apr. 2002).
- (112) Trial Tr. 3674 (24 Apr. 2002).
- (113) Trial Tr. 3704:1-14 (24 Apr. 2002).
- (114) Trial Tr. 3726:18 (24 Apr. 2002).
- (115) Trial Tr. 3738:2-7; 3738:23-25; 3740:1 (24 Apr. 2002).
- (116) Trial Tr. 3741-44 (24 Apr. 2002).
- (117) Trial Tr. 3756:18-23 (24 Apr. 2002).
- (118) Trial Tr. 3759, 3777 (24 Apr. 2002).
- (119) Trial Tr. 3762:1 (24 Apr. 2002).

- (120) Trial Tr. 3774:25; 3777:12-3 (24 Apr. 2002).
- (121) Trial Tr. 3777:12-13 (24 Apr. 2002).
- (122) Trial. Tr. 3777:14-16 (24 Apr. 2002).
- (123) Trial Tr. 4228-30 (3 May 2002).
- (124) Trial Tr. 4257-347 (3 May 2002) (6 May 2002).
- (125) Trial Tr. 4262 (3 May 2002).
- (126) Trial Tr. 4269 (3 May 2002).
- (127) Trial Tr. 8722:23-25, 8723:1-4 (26 July 2002).
- (128) Trial Tr. 8766:22-2 (26 July 2002).
- (129) Trial Tr. 8766:22-25, 8767: 1-25, 8768: 1-6 (26 July 2002).
- (130) Trial Tr. 11162 (8 Oct. 2002).
- (131) Trial Tr. 11401 (10 Oct. 2002).
- (132) Trial Tr. 12918, 1.13-12920, 1.3 (18 Nov. 2002).
- (133) Trial Tr. 16732:1-25, 16733:1-6 (21 Feb. 2003).
- (134) Trial Tr. 17414ff (10 Mar. 2003).
- (135) Trial Tr. 18256ff (31 Mar. 2003).
- (136) Trial Tr. 18269ff (1 Apr. 2003).
- (137) Trial Tr. 19426 (16 Apr. 2003) (Witness B-129).
- (138) Trial Tr. (21, 22, 23, 26, 29 May 2003).
- (139) Trial Tr. 21431ff (2–3 June 2003).
- (140) Trial Tr. 23899ff (9 July 2003) (Testimony of Zoran Lilić)
- (141) Trial Tr. 26981 ll.13-17 (18 Sept. 2003).
- (142) Trial Tr. 29127-325 (18, 19 Nov. 2003).
- (143) Trial Tr. 30369-413 (15 Dec. 2003).
- (144) Trial Tr. 30373 (15 Dec. 2003) (Testimony of Wesley Clark).
- (145) Trial Tr. 30494-95 & 30497 (16 Dec. 2003).
- (146) Trial Tr. 34587 (15 Dec. 2004) (Witness Čedomir Popov).
- (147) Trial Tr. 38876:3-8 (27 Apr. 2005).
- (148) Trial Tr. 40218-319 (1 June 2005).
- (149) Trial Tr. 42887 (19 Aug. 2005); at 43201 (24 Aug. 2005).
- (150) Trial Tr. 34587–8; 43218–9; 43224–5 (25 Aug. 2005) (Witness Vojislav Šešelj).

- (151) Trial Tr. 43265–6 (25 Aug. 2005).
- (152) Trial Tr. 43320–1 (25 Aug. 2005).
- (153) Trial Tr. 43693 (5 Sept. 2005).
- (154) Trial Tr. 11917 (7 Sept. 2005).
- (155) Trial Tr. 46696 (29 Nov. 2005).
- (156) Trial Tr. 46697-711 (29 Nov. 2005).
- (157) Trial Tr. 46711-5 (29 Nov. 2005).
- (158) Vlastimir Djordjevic’s motion for access to transcripts, exhibits, and documents in the case Prosecutor v. Milošević, case no. IT-02-54 (29 Oct. 2007).
- (159) VSO Minutes, Exhibit 667 (12 Mar. 1993).
- (160) VSO Minutes, Exhibit P667, at 29 (10 Feb. 1993).
- (161) Witness Statement of Veton Surroi 4-5 (27 Aug. 2001).

## **B. *Pros. v. Milošević***

- (1) IT-01-50, Order Confirming an Indictment (8 Oct. 2001).
- (2) IT-01-50-I, Initial Indictment “Croatia” (27 Sept. 2001).
- (3) IT-01-50-I, Initial Indictment “Bosnia and Herzegovina” (22 Nov. 2001).
- (4) IT-01-51, Decision on Review of Indictment (22 Nov. 2001).
- (5) IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder ¶30 (18 Apr. 2002).
- (6) IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements (21 Oct. 2003).
- (7) IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (20 Jan. 2004).
- (8) IT-02-54-PT, Order for Commencement of Trial (4 Feb. 2002).
- (9) IT-02-54-T, Trial Tr. 7-8 (12 Feb. 2002).
- (10) IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution’s Motion for Joinder (13 Dec. 2001).



- (11) IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Interlocutory Appeal Hearing, Trial Tr. (30 Jan. 2002).
- (12) IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Interlocutory Appeal Hearing, Trial Tr. (11 Dec. 2001).
- (13) IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (18 Apr. 2002).
- (14) IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution's Motion for Joinder (13 Dec. 2001).
- (15) IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (1 Feb. 2002).
- (16) IT-99-37-I, Initial Appearance (3 July 2001).
- (17) IT-99-37-I, Trial Tr. 2 (3 July 2001).
- (18) IT-99-37-I, Initial Appearance, Written Note by Milošević filed by the Registry (3 July 2001).
- (19) IT-99-37-I, Written Note by the Accused, Registry 3371-2 (3 July 2001).
- (20) IT-99-37-PT, Decision on Preliminary Motions (8 Nov. 2001).
- (21) IT-99-37-PT, Decision on Review of Indictment and Application for Consequential Orders (24 May 1999).
- (22) IT-99-37-PT, Order Inviting Designation of *Amicus Curiae* (30 Aug. 2001).
- (23) IT-99-37-PT, Second Amended Indictment (Kosovo) (16 Oct. 2001).
- (24) IT-99-37-PT, IT-01-50-PT, and IT-01-51-I, Prosecution's Motion for Joinder (27 Nov. 2001).
- (25) IT-99-37-PT, IT-01-50-PT & IT-01-51-PT, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (1 Feb. 2002).
- (26) IT-99-37-PT, IT-01-50-PT, and IT-01-51-PT, Decision on Prosecution's Motion for Joinder (13 Dec. 2001).
- (27) IT-99-37-PT, IT-01-50-PT and IT-01-51-PT, Prosecution's Motion for Joinder, filed November 27, 2001, and Prosecution's

- Corrigendum to Motion for Joinder Filed November 27, 2001 (10 Dec. 2001).
- (28) IT-99-37-PT, IT-01-50-PT, and IT-01-51-PT, Prosecution's Motion for Joinder (27 Nov. 2001).
  - (29) IT-99-37-PT, IT-01-50-PT, and IT-01-51-I, Public Transcript of Hearing (11 Dec. 2001).
  - (30) IT-99-37-PT, Motion for Leave to File a Second Amended Indictment, Attachment A (16 Oct. 2001).
  - (31) IT-02-54-T, Second Amended Indictment (Croatia) (28 July 2004).
  - (32) Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (18 Apr. 2002).
  - (33) Trial Tr. 1:18-25, 2:1-6 (3 July 2001).
  - (34) Trial Tr. 2:1-6 (3 July 2001).
  - (35) Trial Tr. 69 (29 Oct. 2001).
  - (36) Trial Tr. 15-18 (30 Aug. 2001).
  - (37) Trial Tr. 890ff. (25 Feb. 2002).

### **C. Other documents Opening**

Statement of Carla del Ponte, Chief Prosecutor,  
[http://hague.bard.edu/past\\_video/02-2002.html](http://hague.bard.edu/past_video/02-2002.html).

PARKER REPORT: Parker, Judge Kevin, Report to the President: Death of Slobodan Milošević (30 May 2006),  
[http://www.icty.org/x/cases/slobodan\\_milosevic/custom2/en/parkerreport.pdf](http://www.icty.org/x/cases/slobodan_milosevic/custom2/en/parkerreport.pdf).

*Pros. v. Milošević, Milutinović, Ojdanić, Šainović, & Stojiljković*, IT-99-37, Indictment (22 May 1999).

VSO Documents (Supreme Defense Council) VSO Minutes 2, July 29, 1995. There are no stenographic notes for this meeting.

VSO Stenographic Notes 3 (10 Feb. 1993).

VSO Stenographic Notes 3 (5 Aug. 1995).

VSO Stenographic Notes 5 (11 Oct. 1993).

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VSO Stenographic Record 8-16 (12 Mar. 1993).  
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VSO Stenographic Notes 9-10 (6 Dec. 1995).  
VSO Stenographic Notes 10 (6 Dec. 1995).  
VSO Stenographic Notes 12 (7 Aug. 1992).  
VSO Stenographic Notes 12 (13 Jan. 1995) (public redacted version).  
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VSO Stenographic Notes 13 (6 Dec. 1995).  
VSO Stenographic Notes 14 (31 July 1992).  
VSO Stenographic Notes 15 (2 June 1993).  
VSO Stenographic Notes 16-7 (14 Aug. 1995).  
VSO Stenographic Notes 19 (7 Aug. 1992) (public redacted version).  
VSO Stenographic Notes 19-20 (9 Dec. 1992).  
VSO Stenographic Notes 20 (31 July 1992).  
VSO Stenographic Notes 20 (2 June 1993).  
VSO Stenographic Notes 20-1 (12 Mar. 1993).  
VSO Stenographic Notes 22 (30 Aug. 1994) (public redacted version).  
VSO Stenographic Notes 22 (5 Aug. 1995) (public redacted version).  
VSO Stenographic Notes 23 (30 Aug. 1994) (public redacted version).  
VSO Stenographic Notes 24 (30 Aug. 1994) (public redacted version).  
VSO Stenographic Notes 25 (30 Aug. 1994) (public redacted version).  
VSO Stenographic Notes 25 (5 Aug. 1995) (public redacted version).  
VSO Stenographic Notes 27 (2 Nov. 1994) (public redacted version).  
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VSO Stenographic Notes 28 (11 Nov. 1994) (public redacted version).  
VSO Stenographic Notes 28, 30 (10 Feb. 1993).  
VSO Stenographic Notes 29 (2 June 1993).

VSO Stenographic Notes 29 (2 June 1993) (public redacted version); 13 (13 Jan. 1995) (public redacted version).  
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VSO Stenographic Notes 58 (12 Mar. 1993).  
VSO Stenographic Notes (8 July 1992); (23 July 1992).  
VSO Stenographic Record (9 Dec. 1992) (public redacted version).  
VSO Stenographic Notes (12 Mar. 1993).

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### *Pros. v. Al Bashir*

(1) ICC-02/05-01/09, Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (4 Mar. 2009).

(2) ICC-02/05-01/09, Second Warrant of Arrest of July 12, 2010.

*Pros. v. Aleksovski*, IT-95-14/1, Indictment (10 Nov. 1995).

*Arrest Warrant of April 11, 2000, DRC v. Belgium*, 2002 I.C.J. 3.

### *Pros. v. Babić*

(1) IT-03-72, Indictment (6 Nov. 2003).

(2) IT-03-72-S, Judgment on Sentencing Appeal (18 July 2005).

(3) IT-03-72-S, Sentencing Judgment (29 June 2004).

*Pros. v. Bagosora*, ICTR-96-7 and *Pros. v. Kabiligi & Ntabakuze*, ICTR-97-34 and ICTR-97-30 and *Pros. v. Nsengiyumva*, ICTR-96-12, Decision on the Prosecutor's Motion for Joinder (29 June 2000).

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- (1) IT-95-14, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum* (18 July 1997).
- (2) IT-95-14, Order Submitting the Matter to Trial Chamber II and Inviting *Amicus Curiae* (14 Mar. 1997).
- (3) IT-95-14, Second Amended Indictment (25 Apr. 1997).
- (4) IT-95-14-T, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997 (29 Oct. 1997).
- (5) IT-95-14, Trial tr. 703ff. (21 July 1997).

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- (1) Application Instituting Proceedings (20 Mar. 1993).
- (2) Oral Pleadings ¶ 19, 18 Apr. 2006, ICJ Doc. CR 2006/30 (Mr. van den Biesen, Bosnia-Herzegovina).
- (3) Oral Pleadings ¶¶ 58-9, 8 May 2006, ICJ Doc. CR 2006/43.
- (4) Judgment, 2007 I.C.J. 91 (26 Feb. 2007).

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- (1) IT-99-36-A, Appeals Judgment (3 Apr. 2007).
- (2) IT-99-36-A, Decision on Interlocutory Appeal (19 Mar. 2004).
- (3) IT-99-36-AR.73.9, Decision on Interlocutory Appeal (11 Dec. 2002).
- (4) IT-99-36-T, Judgement (1 Sept. 2004).
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One of the pleasures of working at the ICTY was interacting daily with people who knew vastly more about the former Yugoslavia, about courts, and about international criminal law than I did. I sat across a desk from trained historians; I was detailed to teams led by seasoned prosecutors, some of whom had been at the Tribunal since the beginning. In my department, almost all my colleagues spoke better Serbo-Croatian than I did (and in my department, that actually meant something—such knowledge was a rare thing in the Tribunal as a whole, and Albanian was in even shorter supply then).<sup>1</sup>

I have felt a similar pleasure in the course of this project, during which I have had the chance to listen to, dispute with, learn from—and edit—the thoughts and perspectives of individuals whose experience and expertise on so many specific issues vastly outstrips my own. I thought I knew something about the *Milošević* trial when I started this project. I undoubtedly know a great deal more now, but now, I also have my doubts.

Preparing this book has taken about as long as the trial it discusses—which is to say, entirely too long, though at least it has come to a conclusion. Some of the authors gathered in 2010 for a preparatory conference at Indiana University, long recognized as one of the premier sites for academic and public engagement with Eastern Europe and the former Communist world; many others joined the book thereafter. Indeed, one of the advantages of editing this book has been that I have been able to select its participants—or at least to invite them. As I once mentioned to one of the contributors (who took it as the compliment I intended), the only list more impressive than the authors in this book is the list of people who aren't in it.

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*The authors in this book represent three broad disciplinary and professional perspectives—practice at the Tribunal, international legal scholarship, and expert engagement with the former Yugoslavia. Within these broad categories, individual authors bring a number of distinct specializations to the discussion: journalism, history, international relations, and anthropology, as well as legal practice and scholarship. Each writes in his individual capacity.*

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Author: John Bertrand Partridge, issued by the Kosovo Day Committee, 1916,  
© Victoria and Albert Museum, London

**Historicizing national mythology on the cusp of the Yugoslav era:** A Serbian nationalist poster from the First World War. Serbia emerged as the dominant political actor in the region at the end of the war. Serbia's monarchy and military dominated Yugoslavia, which initially was called the Kingdom of Serbs, Croats, and Slovenes—the name itself suggests the structural problem confronting the new state. The Yugoslav project, in both its incarnations, was marked by persistent tensions between centralization that comported with Serbian nationalist interests and decentralization that protected the smaller national communities against

Serbian hegemony. Efforts to resolve those tensions in the first Yugoslavia were cut short and swept away by the Nazi occupation and the overwhelming violence of the internal ethnic and civil struggle. Tito's Communists, emerging as the dominant force at the end of the Second World War, successfully negotiated these tensions for several decades, positioning themselves as the unifying force for the state while suppressing or channeling nationalist sentiments. But Tito's second Yugoslavia turned increasingly to decentralization, in significant part to manage the national question; by the time the 1974 constitution was promulgated and Tito died in 1980, there was little left at the center.



Author: Central Committee of the League of Communists of Yugoslavia;  
Wikipedia Creative Commons license



**Apotheosis—national mythology at the end of the Yugoslav era:** The 600th Anniversary of the Battle of Kosovo Polje, 28 June 1989.

Milošević's speech here was one of the exhibits in the Prosecution's argument about a unifying joint criminal enterprise (JCE) to create a Greater Serbia. Certainly Milošević took his opportunities, but his political appeal was always more complex, a hybrid of nationalist and traditional Yugoslav socialist elements. In his early years, as a rising Communist apparatchik, Milošević showed no signs of nationalist heterodoxy or inclination to challenge the prevailing system; he was as orthodox as he was successful. Much about his personality and personal views was hidden even from close associates. In part, this explained his ability, in the critical years of the late 1980s, to appeal to nationalists, market liberals, and unreconstructed Yugoslav communists—to seem, and perhaps be, many things at once in a time of liquefaction. It is hardly clear that the Prosecution's theory—though doctrinally necessary to explain the joinder of the three separate indictments and perhaps to provide proof of a discriminatory animus required for certain crimes—actually fit the facts of Milošević's psychology and political behavior. Certainly, the theory was vulnerable, and the Prosecution itself had backed away from the language of Greater Serbia even before it had finished putting its case.



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**The fullness of power:** Milošević in presidential pose. His ambition to rule in Yugoslavia could not overcome—indeed, it had helped generate—the centrifugal force of Slovenian, Croatian, Bosniak, and Macedonian nationalisms, but Milošević succeeded in positioning himself at the center of Serbian nationalism and as leader of a smaller, or rump Yugoslavia. For a time, his power was almost unchallenged, but from the mid-1990s on, his support eroded considerably, though his position remained secure until 2000. Through the end of the wars in Bosnia and Croatia, he was the undisputed essential interlocutor of the Western powers; the United States in particular adopted a ‘Milošević strategy’ in its efforts to bring those wars to a conclusion—a strategy that may partly explain the absence of

any significant effort to indict Milošević for crimes in Bosnia and Croatia until the end of the decade.

Milošević's public presentation was consistent; he generally wore this same outfit—blue suit, blue or white shirt, and red tie or tie in the Serbian colors—throughout the trial. He even wore it at his *slava* celebration in Scheveningen prison, whose other inmates—a cross-section of the warring parties, perhaps the last pan-Yugoslav representation of *bratstvo i jedinstvo*—all dressed casually in track suits and T-shirts, celebrating the day together with Milošević.



Central Intelligence Agency, 1992; public domain

**Soon we are seven—ethnicity and political territory:** Of the eight federal units that constituted Socialist Yugoslavia, all save Vojvodina are now independent countries. This map shows the political units and ethnic majorities in the last years of the SFRY. Apart from Bosnia, one could make a fairly good if crude guess about the future state borders by looking at ethnicity, even though the international community's criterion for recognition has been the old internal, federal boundaries, not ethnic majority.

The crudeness of that guess would be measured in blood, however: Apart from Vojvodina, one can practically mark the principal killing fields of the coming wars by noting the areas of mismatch between ethno-national identity and the borders of the SFRY's political units: Croatia's Krajina, an overwhelmingly ethnic Albanian Kosovo inside Serbia, Bosnia above all. What this means, of course, is deeply contested: Arguably the poor fit between those frontiers and the national projects advanced in the names of the various peoples of the former Yugoslavia were a principal driver of the conflict, and certainly that mismatch contributed to the intense and protracted violence.

Slovenia, Croatia, Bosnia and Macedonia declared independence in the early 1990s. Montenegro became independent in 2006. Kosovo, which had been under a UN mandate and NATO protection since 1999, unilaterally declared independence in 2008, a move recognized by a majority of the world's countries but not by Serbia. Throughout the years of crisis, all these units retained their Titoist boundaries, and were recognized as independent countries within those boundaries.





Dusan Petricic, NIN. By permission of author.

**“The Anatomy Lesson”—A Serbian view of the war’s course:** A persistent theme throughout the Yugoslav dissolution was the involvement of the great powers—their interventions and their failures to intervene. The restructuring demands of the IMF in the 1980s were said to have precipitated the country’s collapse; Germany’s hasty recognition of Croatia and Slovenia in late 1991 to have ignited the crisis in Bosnia; the UN’s weapons embargo to have reinforced Serbia’s military advantage; and of course NATO’s intervention in 1999 to have secured Kosovo’s independence and the alliance’s own preeminent position in the region. In this context, the ICTY itself was seen by many in the former Yugoslavia as one more element of great power interference, welcome or unwelcome by turns. Just such a theme of heroic resistance to the great powers was also to provide the centerpiece of Milošević’s highly political and historically informed defense.



Picture 1: Author: Kocelj, Jure; Source: Jurek; Picture 2: Author: Toman; Source: Jurek; Documentation: Lacetna



**Methods of war—Croatia 1991:** In Eastern Slavonia, fighting involved shelling by armored units of the JNA, such as this T-55 tank disabled in the Battle of the Barracks. Initially in an ambiguous position as preservers of the state, the JNA soon openly allied with Serbs and Milošević. Serbian paramilitaries also fought in the region; they were extravagantly nationalist from the outset, and the only ambiguities involved the degree to which they were really, in effect, criminal gangs, and how much they were under Belgrade's control. Sieges of towns—Vukovar, whose shelled water tower is one of the icons of the war; Osijek; the medieval walled

city of Dubrovnik—galvanized European and global attention, but external intervention was initially quite limited. By the beginning of 1992, front lines had stabilized between an interposed UN peacekeeping force, with Croatia’s independence established but large areas in the Krajina and Slavonia under the control of a de facto Serbian state, the *Republika Srpska Krajina*. Milošević had extraordinary influence over the leadership of this entity, and it was upon this influence, as well as his de facto leadership of the JNA, that the Prosecution’s case against him for the *Croatia* phase was based.



Picture 1—camp. Courtesy of the ICTY  
Pictures 2–4—composite. Author Estanley. Creative Commons License

**Methods of war—Bosnia:** Shelling at Sarajevo; Bosnian Serb General Ratko Mladić; UN peacekeeper; detainees at Manjača camp. Serb concentration camps and the siege of Sarajevo formed the iconic centerpiece of the Yugoslav conflicts, at least until the massacre at Srebrenica. Milošević's relationship to the Bosnian Serbs, such as Mladić, was the heart of the *Bosnia* indictment. Lightly armed UN forces, subject to a paralytic double chain of command, were ineffective in stemming the violence; only intervention by NATO from 1994 on helped bring the conflicts in Croatia and Bosnia to a violent climax in 1995. Indeed, the ICTY's establishment in 1993 was criticized at the time—accurately, at least in part—as an attempt by some of the great powers to be seen to being doing something in lieu of a more robust military intervention.

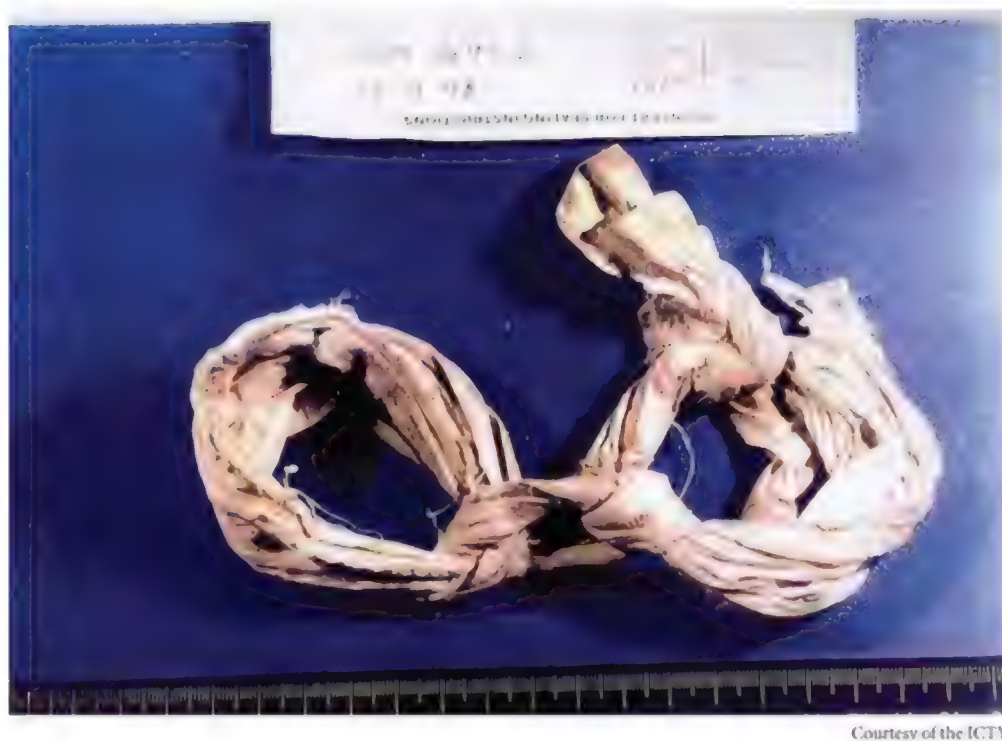


Courtesy of the ICTY

**Methods of war—Srebrenica exhumation:** One of the principal and most prominent charges against Milošević concerned the 1995 massacre at Srebrenica in Bosnia, which the ICTY had found constituted genocide. The basic facts of the genocide were not particularly at issue in the *Milošević* trial, but his relationship to those facts—and the proofs of his intent to commit genocide—were highly contested; it was widely supposed that the Prosecution's case was vulnerable, especially given the judges' narrow and formal interpretation of the special intent requirement. Although

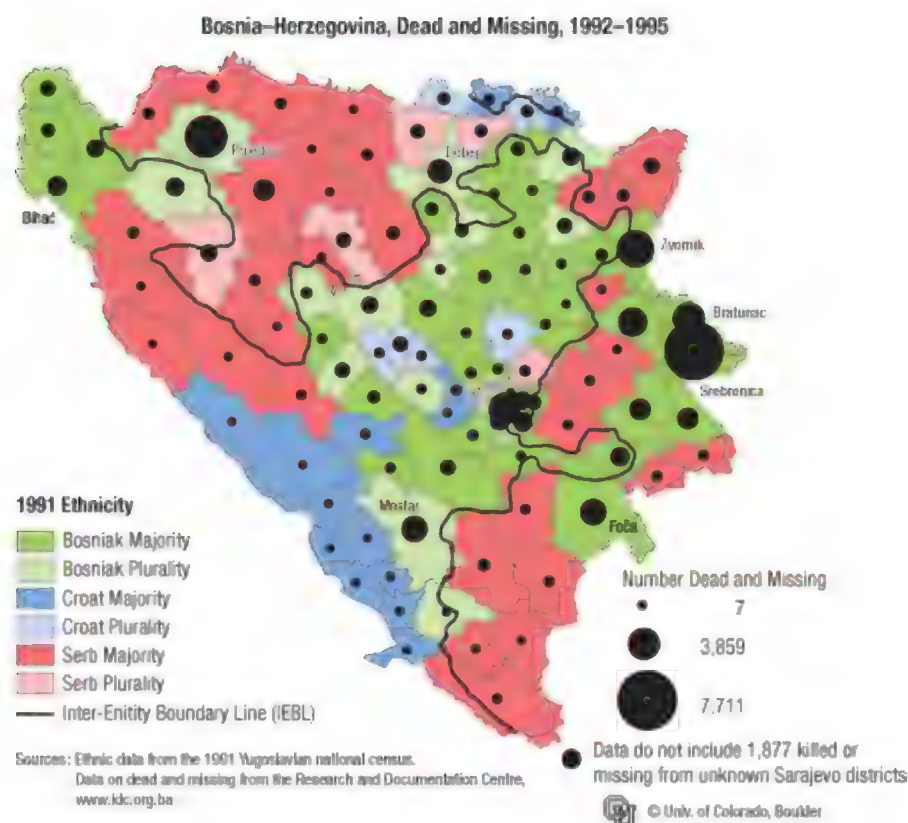


Srebrenica's status as a genocide is clearly established at the ICTY, in Bosnia and Serbia its meaning and implications are fiercely contested along lines that suggest the Tribunal's truth-telling and reconciliatory functions have not worked as their most optimistic advocates originally imagined.

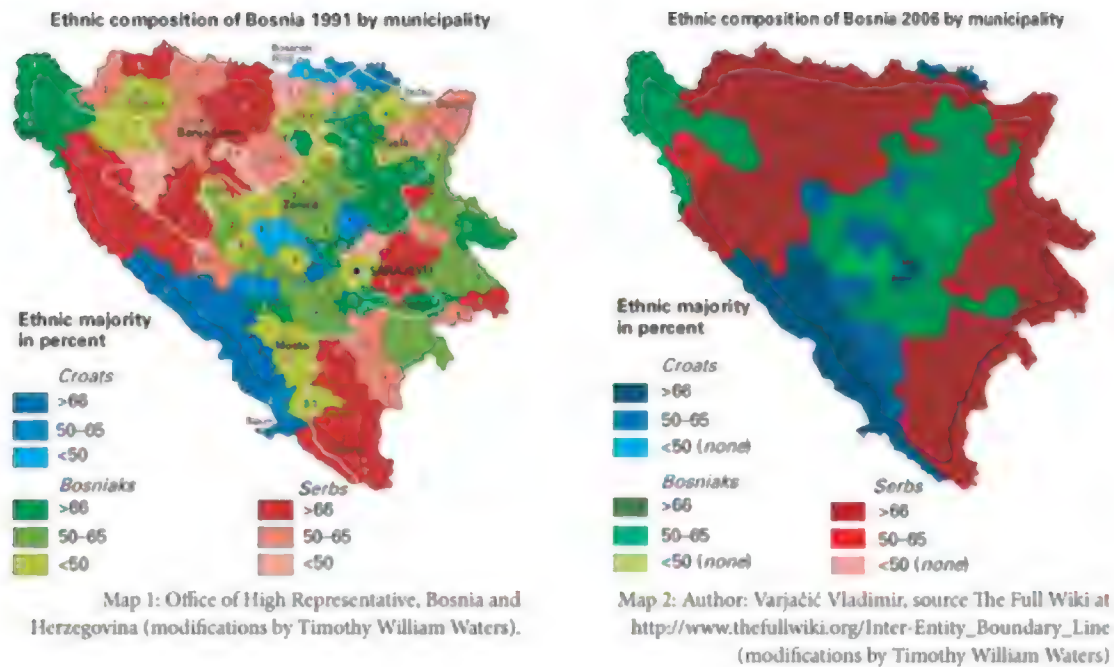


**Methods of war—Srebrenica ligature:** Many of the crimes for which Milošević was charged were well established by physical evidence, documentary records, and witness testimony; many had been tested and proven in other trials. But what is the significance of such evidence for a leadership case such as *Milošević*, in which the Accused took no direct part and for which the real question is the existence of a complex, often illicit chain of effective command running from the capital to the killing fields? Actual victims have little to say about this; instead, extensive documentation—such as of the role of the VJ in supplying and coordinating with the VRS in Bosnia—and the testimony of high-level insider witnesses is essential. In such cases, the underlying crime base is often not really at issue, although Milošević did contest even the basic facts, especially for the *Kosovo* phase, in which he questioned Kosovar

eyewitnesses' credibility and tried to direct the Chamber's attention to the parallel war being fought by NATO.



**Methods of war—Bosnia:** By far the largest numbers of killings occurred in areas that had Bosniak majorities before the war, in areas seized by Serb forces—especially the Drina Valley and Prijedor—with the other significant cluster in besieged Sarajevo. The killings served their purpose, as the following maps show.



**Methods of war—Bosnia:** Demographic alteration through ethnic cleansing. The maps show the ethnic composition of Bosnia in 1991, before the war, and after, in 2006. The more recent map is vastly simplified, with almost all the territory divided up into areas overwhelmingly dominated by a single group. Although there are still pockets of heterogeneity, for the most part the ethnic divide tracks the internal political divisions confirmed at Dayton. (The Inter-Entity Boundary Line is marked, anachronistically, on the first map, but it is hardly needed for the second; with a few exceptions in sparsely populated areas of the west, one can mentally trace the line simply by looking at the changes in color.) These changes are indisputable; the question for the trial, of course, was how to relate the causes of these changes to Milošević. In addition, the fact of demographic change presents the question of what, if anything, a trial can do about it.



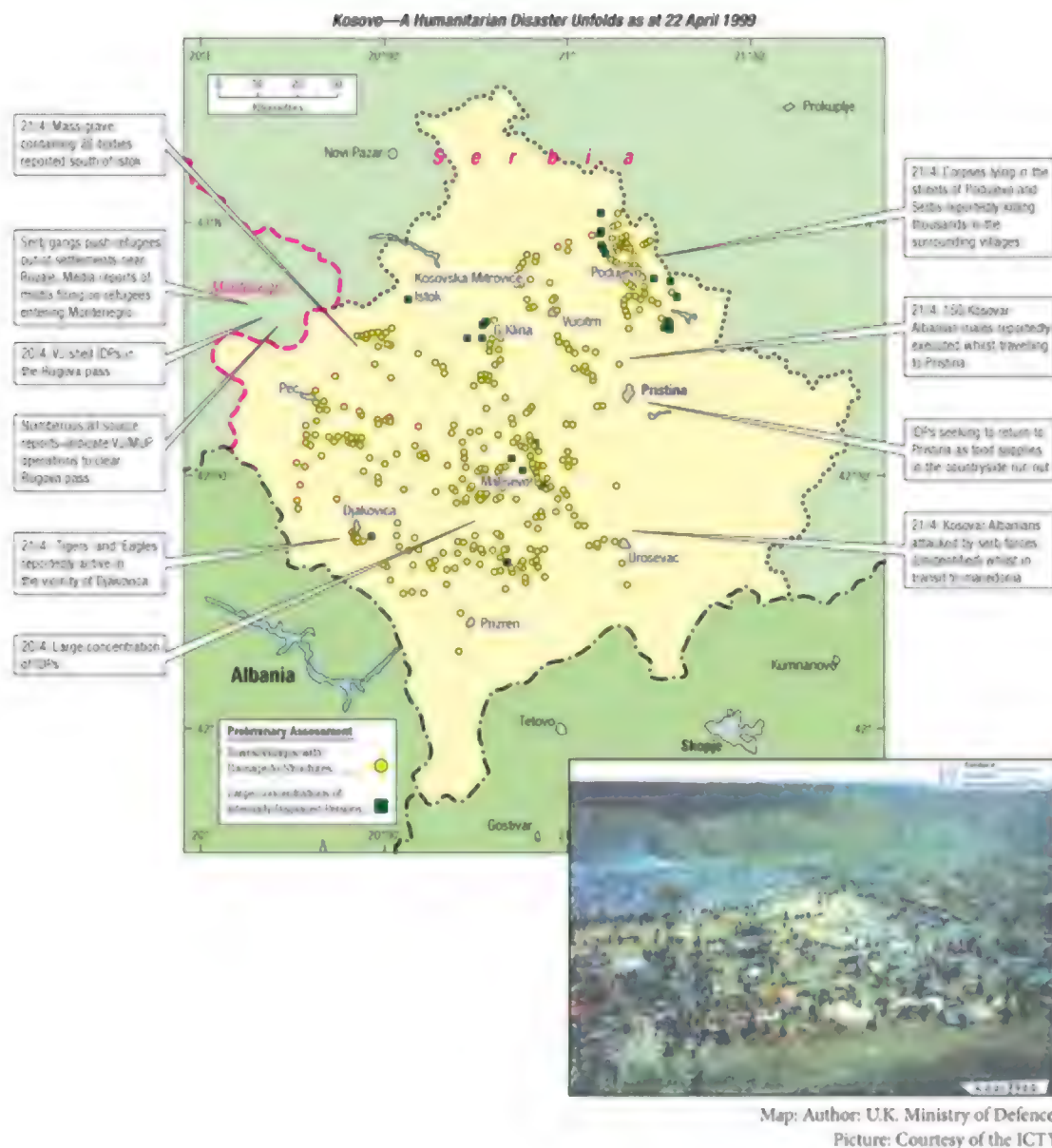


Author: U.S. Air Force, public domain

**In the political center—signing the Dayton Accords:** Negotiated under American auspices on a U.S. airbase in Ohio, signed with public ceremony in Paris, the Dayton Accords brought an end to the conflict in Bosnia and effectively in Croatia. It marked the culmination of American intervention in the conflict, superseding the Europeans, as well as the culmination of the U.S. ‘Milošević strategy.’ Here Milošević signs along with, to his left, President Alija Izetbegović of Bosnia and President Franjo Tuđman of Croatia. Of course, Serbia is not formally part of the war in Bosnia, and neither is Croatia; each is signing on behalf of proxies or allies. This level of dominance and authority would later constitute part of the basis for the Prosecution’s case that Milošević had the requisite control over the notionally autonomous Bosnian Serb forces; certainly, on this day, in his role as essential peacemaker, he did, as he signed the peace deal on their behalf., but during in the war his control over the Bosnian Serbs varied considerably. Five years later he would be indicted for crimes in these wars. Tuđman was investigated but never indicted, though he was later named as an unindicted co-perpetrator in other cases; Izetbegović was never indicted. The Swedish politician Carl Bildt, third from right, was co-chair of the Dayton conference, and later the High Representative in Bosnia. He was called to testify in the *Milošević* trial, concerning

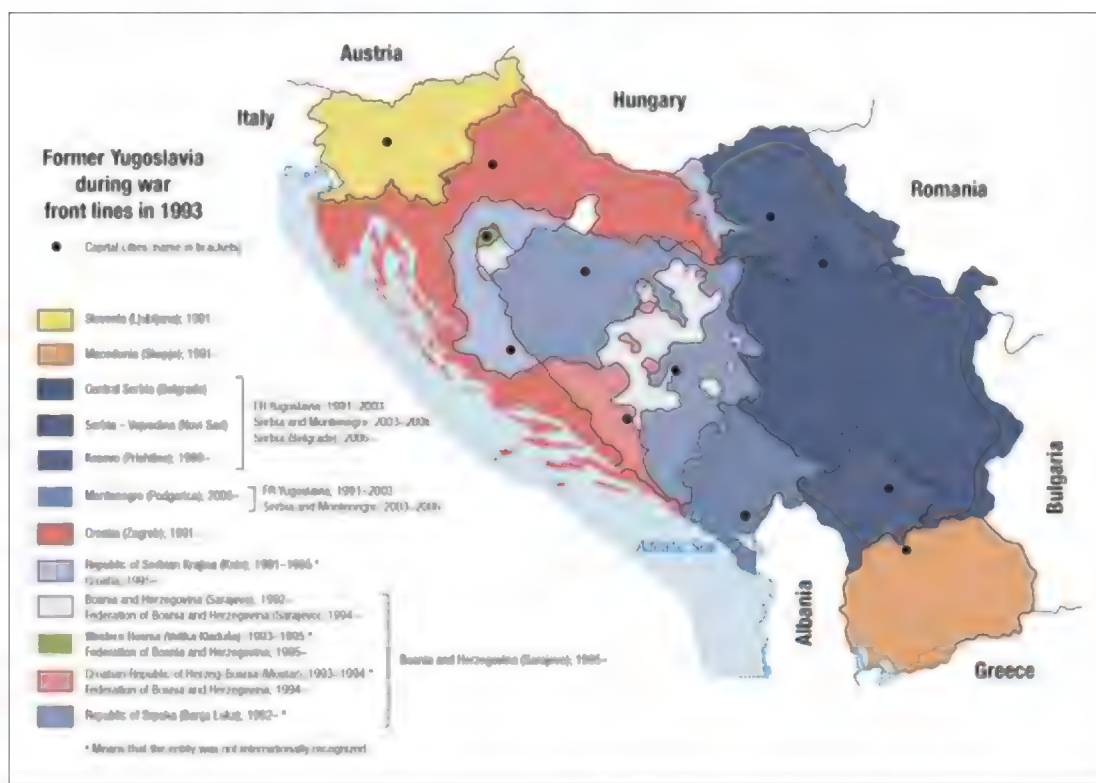


meetings he had with Milošević just before and after Srebrenica, but never actually did.



**Methods of war—Kosovo 1999:** Milošević was first indicted for crimes during the Kosovo conflict, although the levels of death and destruction in Bosnia and Croatia, for which he was later indicted, were considerable greater and took place over a long period of time. The signal crime of the Kosovo conflict was expulsion, with Serb forces displacing almost half the Kosovar Albanian population in a few weeks, as with this group of refugees from a photo introduced in evidence at the trial. Milošević

challenged that account in court, claiming that NATO's bombing campaign had caused the mass exodus, but the Prosecution presented persuasive eyewitness and statistical evidence refuting this. NATO's campaign was fairly clearly illegal under international law, though this was not a crime over which the ICTY had jurisdiction. The Tribunal did have jurisdiction over NATO's actions during the bombing, but declined to investigate, instead issuing a curiously public report concluding that no investigation was warranted. For Milošević, NATO was the true culprit, around which he built his own case in The Hague.



Author: Paweł Goleńkowski; Wikimedia Commons GNU license

**The scope of the crimes I:** The wars of the Yugoslav dissolution were waged between 1991 and 2000, in distinct phases and theaters. The *Milošević* trial advanced a common interpretation, uniting the principal wars and crimes alleged against Serbs in a single coherent narrative. Each of the three major wars—Croatia, Bosnia, and Kosovo—had its signal forms of violence and criminality; the Prosecution's principal thesis, however, identified a common plan and purpose uniting them—a plan to create or maintain a “Greater Serbia.” Whether this theory was necessary or advisable is a matter of controversy; undoubtedly it implicated broader

political, historical, and social understandings beyond the formally forensic purpose of the Tribunal.



**The scope of the crimes II:** The Prosecution’s theory ensured that the scope of the *Milošević* trial—which was always going to be large—effectively overlapped with the entire ICTY’s jurisprudence targeting Serb indictees. A map of crimes alleged against Milošević is, in effect, the Prosecution’s map of Greater Serbia and of the joint criminal enterprise to achieve it. The crimes Milošević was charged with also overlap—geographically, jurisprudentially, and oft en literally—with those charged against most other Serb indictees. Although there are some sites charged against Serbs but not Milošević, especially in northern Bosnia, no area in which criminal activity by Serbs was alleged does not also have allegations against Milošević; all but three sites charged against Milošević (Rač ak, Istok, and Voćin) are also charged against other Serbs. No other

case is related to so many other cases—46 in all. And no other case charged crimes in all three theaters. The charges against Milošević are a summation of the Yugoslav wars and of the Tribunal's jurisprudence. (NB: The listed sites are locations; they do not indicate the relative size of the crime base or the particular charges. One dot may represent a single act of rape, as in *Furundžija*, or the killing of thousands of people, as at Srebrenica. The fact that a crime site is shared does not mean all indictees charged for acts at that location were charged with the same crimes; sites shared by Serbs and Bosniaks, or Serbs and Kosovars, represent crimes allegedly committed in the same by actors on opposite sides of the conflict.)



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President of the Federal Republic of Yugoslavia

**For genocide and crimes against humanity**




**Radovan Karadžić**      **Ratko Mladić**

Milošević, Karadžić, and Mladić have been indicted by the United Nations International Criminal Tribunal for the Former Yugoslavia for crimes against humanity, including murders and rapes of thousands of innocent civilians, torture, hostage-taking of peacekeepers, wanton destruction of private property, and the destruction of sacred places. Mladić and Karadžić also have been indicted for genocide.

To bring Milošević, Karadžić, and Mladić to justice, the United States Government is offering a reward of up to \$5 million for information leading to the transfer to, or conviction by, the International Criminal Tribunal for the Former Yugoslavia of any of these individuals or any other person indicted by the International Tribunal.

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**Judicial process and state power—State Department wanted poster for Milošević, Karadžić, and Mladić:** The 1999 Kosovo war marked a new phase in Milošević's political career and in the judicial process. The U.S.—whose attitude toward the investigation and indictment of Milošević had often been ambiguous—now came out squarely in support of Milošević's removal to The Hague, and from power. This U.S. wanted poster—produced after the *Kosovo* indictment but before the *Bosnia* and *Croatia* indictments, and therefore before Milošević was charged for genocide in Bosnia—also visually presages the relationship the Prosecution would later describe between Milošević and the two leading Bosnian Serbs.

Much later, after Milošević's death, in their own trials the Prosecution would put greater emphasis on Karadžić's and Mladić's place at the center of events.

On the night of 28 June 2001, Milošević was transferred to The Hague. Western pressure to arrest and transfer Milošević had been great, and the incentives offered equally so; within Serbia, the issue became a focal point of contestation between the new Serbian government under Zoran Đinđić and the FRY presidency under Vojislav Koštunica. On the anniversary of Milošević's triumphant speech at Kosovo Polje, Serbian units flew him out of the FRY, over the opposition of the federal authorities. This turn to cooperation may have formed part of the motivation for the coup attempted by security forces later in the year, and for the eventual assassination of Đinđić in 2003. By then, Milošević was on trial.



Courtesy of the ICTY

**The building of the ICTY**, Established by order of the UN Security Council in 1993, in the middle of the Bosnian and Croatian wars, the ICTY was, as observers frequently noted, housed in a former insurance office, though whether this meant to suggest an ennobling transformation or a

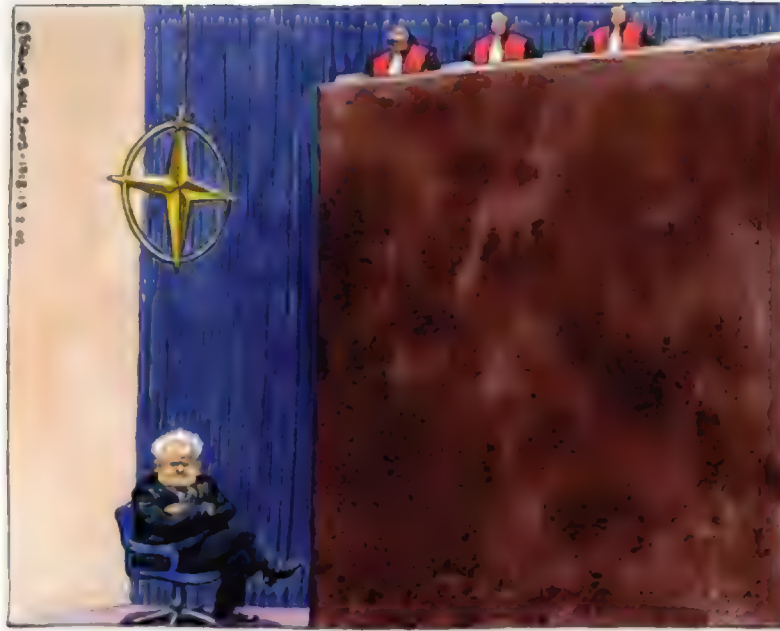
hopelessly irredeemable mediocrity is unclear. The courtrooms, including Trial Chamber I in which the *Milošević* trial took place, are in the center of the building, located in The Hague. By far the largest share of the building's occupants worked for the Prosecution; originally there were no dedicated facilities for defense, although over time the formal position of the defense bar improved, and the Registry developed more means of supporting self-representing accused.



Photo: Courtesy of the ICTY.

**Law and politics in Trial Chamber I:** The *Milošević* trial took place in this room. Its sleek and modern design drew regular comparisons to the deck of the Starship Enterprise, despite an abundance of hardwood. The comparison meant to point out the radical difference between the facilities and process in The Hague and the kind of justice dispensed in the former Yugoslavia, but also the enormous distance between the institution and the communities that were, notionally, its principal audience. Milošević mounted a defiant, solitary defense and an aggressive counterattack on the Tribunal as a lackey of NATO; whether this would have proved a successful legal strategy, it clearly had some success in reaching Serbs, if not the other peoples of the former Yugoslavia, and in making the institution look hapless.





Cartoon. Author: Steve Bell. By permission.



All pictures: Courtesy of the ICTY.

**Judges of the Chamber:** (clockwise from upper right) the late Richard May, the first presiding judge, who resigned from the case in early 2004 due to illness; Lord Iain Bonomy, who replaced May; Patrick Robinson,



who became the second presiding judge; O-Gon Kwon, who dissented on part of the Bosnian genocide charge in the Rule 98 *bis* no-case-to-answer decision at the trial's midpoint.



**Prosecution, Accused, and *Amici*:** (clockwise from upper left) Chief Prosecutor Carla Del Ponte, who presided over the production of the *Croatia* and *Bosnia* indictments and the trial; Milošević during his initial appearance, when he declared the ICTY a “false tribunal;” two of the *Amici Curiae*, Michael Wladimiroff and Steven Kay (standing)—Kay later was appointed defense counsel, a position Milošević never accepted and effectively fought against; Geoffrey Nice, the Senior Trial Attorney responsible for the case as a whole.



Permission: Humanitarian Law Centre

**Ocular proof:** Late in the trial, a video was found by human rights activist Nataša Kandić, showing executions of Bosnian Muslims carried out by the *Škorpioni*, a Serb paramilitary organization connected to the Serbian MUP, following the fall of Srebrenica. Kandić gave the video to both the ICTY Prosecution and television stations in Belgrade. The juridical impact in the trial was unclear—the video was shown during the cross-examination of a startled Gen. Obrad Stevanović, but not formally introduced into evidence—but the effect in Serbia was dramatic: This was striking visual proof that Serbian forces were involved in killings inside Bosnia. Several of the *Škorpioni* members depicted were tried and sentenced in the Serbian courts. Still, the effect on Serb public opinion appears to have been temporary, and the fact of Serb complicity in crimes—or of Serbian state involvement—is not widely accepted in Serbian society, even as it is an article of faith for Bosniaks and others in the former Yugoslavia.

The men dragging the body into the woods will themselves reappear in the video, dead, in about 50 seconds.



AP Photos/Darko Vojnovic

**Legacies:** A mourner in September 2006, marking the end of the Orthodox mourning period. When Milošević died, his trial ended, leaving a changed and chastened Tribunal behind, but also a far more ambiguous impact than the early expectations for the trial had predicted. In Serbia, his political center, his legacy was also complex: sustained support of a certain kind, and arguably the continuation of many of the policies undertaken by Milošević's regime, though without the violence. And beyond the legacy of the man and his politics, that of his trial and of an institution: What relationship has the *Milošević* trial and the work of the ICTY had to transformations of society and politics in the former Yugoslavia?

\* The small number of Macedonian cases stand apart.



\* Every author in this book—present and former employees of the ICTY, other tribunals, governments, or private organizations—is writing in his personal capacity.

\* For convenience, we refer to names of Yugoslav institutions in Serbo-Croatian, but all federal organs had names in the other languages as well, such as Slovenian and Macedonian; institutions in the autonomous provinces employed yet other languages. And, for convenience, we refer to the language as Serbo-Croatian, rather than BCS or any of its other names; we refer to Serbian, Croatian, and so forth if those specific variants are most relevant.

† See Trix's chapter at 246 and 555, n. 95.

‡ I wish to expressly thank certain authors writing about or from a Kosovar Albanian perspective, who, had they been of less generous spirit, would have objected to the use of “Kosovo” or of Serbian place names, but accepted them in the context of the overall project. Readers should strive to do the same; indeed, anyone focused on those authors’ arguments, rather than their orthographic flexibility, would be in no doubt about their sympathies.



\* There are also four timelines at the back of the book, beginning at 491, corresponding to the four introductory chapters.

† A cross-reference to one of the individually authored chapters does not imply agreement with the points made in these four introductory chapters, nor does it provide a foundation for the arguments made here; the cross-reference means simply that a similar issue is discussed there.

‡ The four chapters in this section were written by the editor.

\* *Pros. v. Tadić* (4), Trial Tr. 123-4 (7 May 1996).



\* *See* in particular Nielsen, Bieber (Response), Waters, and Meierhenrich on this issue.

† On the region's name, *see* MAZOWER, BALKANS: A SHORT HISTORY xxv–xxx; *see also generally* TODOROVA, IMAGINING THE BALKANS. The negative associations with “Balkan” has led to calls for a move toward “Southeastern Europe,” though of course this would make it difficult to speak only of the region's western, former Yugoslav portion. *See* LAMPE, BALKANS INTO SOUTHEASTERN EUROPE: A CENTURY OF WAR AND TRANSITION.

\* *See* WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 34–35 (citing to “Preventing War in Kosovo” (Lund, Sweden: Transnational Foundation for Peace and Future Research, 9 July 1992, at 14)). The last official census in Yugoslavia, in 1991, shows Albanians and Serbs as 82.2 and 9.9 percent of the population, respectively. *See* JUDAH, KOSOVO: WAR AND REVENGE 313 (citing data from Statistički godišnjak Jugoslavije za 1992, [sic] godinu at 62–63, *in* Milan Vučković and Goran Nikolić, Stanovništvo Kosova u razdoblju od 1918. do 1991. godine, at 108–09). These figures have been contested by partisans on both sides. *See generally* CHEN, TRANSITIONAL COOPERATION OF ETHNOPOLITICAL MOBILIZATION 161 (referring to the dispute between Serbs and Albanians about the accurate percentage of the Albanian population in Kosovo at the time of the 1991 census).

† FINE, JR., WHEN ETHNICITY DID NOT MATTER IN THE BALKANS 170–01 (critiquing nationalist views of lineage). The extinction of the Serbian state in particular formed a powerful element of nationalist mythology that was expressly mobilized during the dissolution of Yugoslavia, through invocation of the battle of Kosovo Polje, at which forces allied with the Serbian kingdom had been defeated by the Ottomans.



‡ *But see* DONIA & FINE, BOSNIA AND HERCEGOVINA 7 (describing Bosnia as a “separate and legally defined provincial entity during its 400 years under Ottoman rule. It also maintained its own special status both under Austrian rule and as part of Yugoslavia. As an integral territory, including Hercegovina, Bosnia has had more durable and widely recognized borders through the centuries than either Serbia or Croatia.”).

\* But not Dalmatia or the Istrian peninsula, which were Austrian crown lands. The idea of these units forming a single political entity was a widespread aspiration in various Croat political circles.

\* *See* MALCOLM, BOSNIA: SHORT HISTORY 185–89, 197–202. Various Serbian or Croatian nationalist ideologies have imagined Bosnia's Muslims as lost or apostasized members of the nation, views some Bosnian Muslims have themselves entertained, though rarely in recent decades.

\* The social organization of Ottoman Bosnia, for example, afforded considerable privilege to Muslims (not all of them Slavs, of course), which led to patterned differences in landholding. PINSON, MUSLIMS OF BOSNIA-HERZEGOVINA (“By 1800, political authority in Bosnia had for some time been held by hereditary Muslim notables, called *kapudans* (captains). The *kapudan* system had evolved from the Ottoman *timar* system that involved giving military leaders control of conquered lands and allowing them to use the proceeds from the lands to support their soldiers ... In the eighteenth century ... the *kapudans* and lesser notables largely succeeded in keeping their control over their lands while ignoring the legal rights both of peasants and of the sultan. Because the sultan’s government was too weak to assert its prerogatives, Bosnian notables were able illegally to convert crown lands into private holdings.”)



† Mazower describes both acts of violence and preemptive steps—separation of populations, sale of property—during the Ottoman decline in the 19th century that indicate contemporary awareness of the potential for disputes between ethnic and confessional communities. MAZOWER, *THE BALKANS* 115–16. These are not necessarily the same as nationalist interpretations—their character is ambiguous—and Mazower himself does not characterize them that way.

‡ *See* Swimelar at 199.

§ See Trix and Krasniqi on this.

\* Those inclined toward linguistic determinism will perceive looming trouble in the ambiguity inherent in the name adopted by the wartime Partisans: *Antifašističko vijeće narodnog oslobođenja Jugoslavije* (Anti-Fascist Council for the People's Liberation of Yugoslavia or AVNOJ). *Narod* means both “people” and “nation”—and in the event the latter were understood, it would hardly be clear exactly what nation was being liberated, as few people perceived the population of Yugoslavia to be a single nation. *Narod* also contrasts with *narodnost*, nationality, used to describe groups such as Hungarians and Albanians who, because they had national homelands elsewhere, did not have the status of nation (or people) within the SFRY, though they enjoyed considerable protections and, in the case of Kosovar Albanians after 1974, dominated one of the eight federal units.



† *See* Prelec at 365 for comments by Milošević on Chetnik tendencies among Serb paramilitaries.

\* On the confluence of factors that allowed Milošević's rise, *see* Bieber at 424.

† Milošević himself apparently did not make any public statements against the Memorandum, but his behavior at this time was solidly within the Titoist orthodoxy—“an outright anti-nationalist and a Communist hardliner[.]” PAVLOWITCH, *SERBIA, HISTORY OF AN IDEA* 190. *See also* DRAGOVIĆ-SOSO, *SAVIOURS OF THE NATION: SERBIA’S INTELLECTUAL OPPOSITION* 176–89, 220–21; LEBOR, *MILOSEVIC: A BIOGRAPHY* 7–78 (on the Memorandum and Milošević’s reaction); LAMPE, *YUGOSLAVIA AS HISTORY* 347 (Milošević stated that the Memorandum was “nothing but the darkest nationalism”).

\* On the later consequences of the post-SFRY constitutional structure for Milošević's indictment and arrest, see Williamson at 83–86, 88, and Várady at 460–461 respectively.



† Each subsequently suspended its declaration's effective operation for several months.

‡ On the Prosecution's claims regarding Greater Serbia, *see* especially Prelec, Waters, and Nielsen.

§ The ICTY has no jurisdiction over the crime of aggression. *See* [Chapter 2](#) at 35.

¶ See [Ch. 4](#) at 61–63; on a related point concerning the broad scope of joint criminal enterprise or JCE claims, *see* Boas at 108–110, 114, 116.



\* On the legacies of the Croatian conflict, *see* Lamont; Prelec also includes discussion of the wartime relationship between Belgrade and Croatian Serb authorities.

\* See, e.g., *Milošević* trial, Indictment ¶ 57 (22 Nov. 2001). The Karadžević Agreement was also significant for the interpretation of Croatian war aims. See, e.g., *Pros. v. Blaškić* (5), Trial tr. 703 ff. (21 July 1997). JCE is discussed in [Chapter 2](#). On Croatia's interests, see Hoare, *The Croatian Project to Partition Bosnia-Herzegovina*, 31 EAST EUR. Q. 121 (1997). On JCE, see in particular the chapters by Boas, van der Wilt, Meierhenrich, Del Ponte, Prelec, Lamont, and Waters.

\* The relationship of the outbreak of hostilities to the referendum and Western recognition of Bosnia's independence is a contested matter. The major fighting commenced on 6 April, the same day E.C. foreign ministers recognized Bosnia. But major episodes of violence preceded the full outbreak of hostilities, including Arkan's paramilitary attack on Bijeljina and fighting in Bosanski Brod at the end of March. JNA units fired shells at Sarajevo on 5 April. JNA forces also attacked Ravno in Herzegovina in October 1991. *See* GLAUDIĆ, HOUR OF EUROPE: WESTERN POWERS AND THE BREAKUP OF YUGOSLAVIA 296–98 (arguing against a causal link between recognition and the fighting, but noting that there are numerous accounts to that effect in the literature.) On Bijeljina, see, for example, Gallivan, Witness Says Bosniaks Killed before War Began, IWPR, Jan. 31, 2009, <http://iwpr.net/report-news/witness-says-bosniaks-killed-war-began> (discussing testimony in *Šešelj* about killings in Bijeljina in early April 1992). The level of fighting and of ethnic cleansing increased dramatically from 6 April, but certainly Bosnia was already highly unstable and violent well before the moment of independence and recognition—facts relevant to any effort to assign responsibility for the war and, perhaps, its crimes.

\* The Bosnian Serb Assembly determined the RS' war aims in May 1992. These included the unmixing of the three constituent peoples and various territorial provisions, such as the division of Sarajevo, the creation of a corridor to Serb parts of Croatia, and the elimination of the Drina as a frontier. *Pros. v. Krajišnik* (8), Exhibit P529.645, *Zapisnik za 16. sjednice Skupštine srpskog naroda u Bosni i Hercegovini održane 12. maja 1991. godine u Banja Luci*, ICTY Document 00847711-0084761; *Pros. v. Krajišnik* (2), Judgment ¶¶ 900, 994–95, 1002 (2 Sept. 2006) (discussing the strategic goals, but also noting, at 995, that “in the final analysis they are anodyne statements, serving as official state policy and even qualifying for publication in the [RS'] *Official Gazette*. If one is inclined to find in them insidious hidden meanings, it is because of the context and the events that followed. An anachronistic reading of the May goals is not only inadvisable, it misses the point....”). In November 1993, representatives of the various Serbs political units—FRY, RS and RSK—drafted the so-called Drina Plan, anticipating the creation of a common Serbian state. See *Pros. v. Perišić* (3), Judgment, ¶ 1306 (6 Sept. 2011).



† Bosniaks, militarily the weakest party, controlled a far smaller territory than their (relatively more urbanized) prewar settlement patterns would have indicated.

‡ On Milošević's and the Serbs' war aims, see particularly Prelec and Nielsen.

\* Prelec examines the nature of Milošević's relationship to paramilitaries and forces in Bosnia and Croatia.

† *See* Bassiouni on the wartime diplomatic context in the early 1990s.



\* *See* Bassiouni at 94–98.

† *See* Williamson at 77–80.

\* The many contempt cases are an exception, but these are derivative of the underlying trials themselves; they are even listed separately on the ICTY's Web site.

† Prominent examples include the running negotiations between the Tribunal and Serbia over access to the minutes of the *Vrhovni Savet Odbrane* (Supreme Defense Council or VSO, discussed later in this chapter)—as well as the broader negotiations between the Tribunal and, respectively, Croatia and Serbia over access to documents—or the showing of the *Škorpioni* video showing killings at Srebrenica, or even the fact that the attempted 2001 coup by Serbian security forces was motivated, in part, by a desire to derail cooperation with the Tribunal. SUBOTIĆ, OTIMANJE PRAVDE: SUOČAVANJE S PROŠLOŠĆU NA BALKANU 93 (discussing the coup). On the VSO documents and the related case at the International Court of Justice, see chapters by Prelec, Waters, Shany, Várady, and Hartmann; on the *Škorpioni* video, *see* in particular chapters by Bieber at 432 and Hartmann at 471–474, 481; on the coup, *see* Pešić at 417.



\* *See* Lamont's chapter on the interaction of the ICTY with Croatian politics.

† Swimelar discusses the reactions to Milošević's trial in light of this wartime legacy.

‡ The next section of this chapter discusses this further.

\* See Trix, Kostovicova and Krasniqi for discussions of the reactions to the *Milošević* trial among Kosovars that draw heavily on the postwar political and social context.



† On the events, *see* Bieber and Pešić. On post-Milošević developments in Serbia, *see* Bieber, Pešić, and Dragović-Soso.

‡ The transfer of Milošević is discussed in detail in Shany, at 448–451; see also Várady at 460–461.

§ *See* Pešić at 417.

¶ *See* Bieber at 422, Pešić at 412*ff.*



\* *Cf.* discussion in Várady at 462–464.

† On the VSO documents, see Prelec, Waters, Shany, Hartmann, Várady, and Swimelar.

‡ The ICJ found that Serbia had violated its obligations under the Genocide Convention by failing to prevent the genocide in Srebrenica. *See Bosnia v. Serbia*, Judgment, 2007 I.C.J. 43, ¶ 471(5) (“by twelve votes to three, *Finds* that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995”). On the VRS’ culpability, see *id.*, ¶ 297 (“The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.”).

† On reconciliation in the region, *see* Bieber and Drumbl (Serbia), Trix, Kostovicova and Krasniqi (Kosovo), Swimelar (Bosnia), and Lamont (Croatia).



<sup>†</sup> See Kostovicova at 251, n.†., and Dragović -Soso at 408

‡ *See Kostovicova's chapter on RECOM.*

\* See, generally, Meron, *War Crimes Law Comes of Age*, 92 A.J.I.L. 462 (1998). The establishment of the ICTR in 1994 was in large part a reaction to the creation, the previous year, of the ICTY, and the Rwanda Tribunal is closely modeled on the Yugoslav Tribunal. Subsequent tribunals have been established for Sierra Leone, East Timor, Lebanon, Cambodia, and of course the International Criminal Court. In the 2011 Libyan conflict, for example, the Security Council referred the situation to the ICC within weeks of its outbreak. On the proliferation of tribunals more generally, see Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

† *See* Bassiouni.



\* *See* Greenawalt for an interpretation of the ICTY's origins and purposes.

\* On command theories, *see* chapters by van der Wilt, Hartmann at 474–480, and Williamson at 82–84, 86–87, and 88.

† Nuremberg allowed guilt based on membership in criminal organizations, such as elements of the SS. In theory, once the criminality of the organization was established, only proof of membership would be required, not any particular showing of individual action or mental state. This was one of the most controversial elements of the IMT's jurisdiction, and relatively little used. *See, e.g.,* Jørgensen, *Reappraisal of the Abandoned Nuremberg Concept of Criminal Organizations in the Context of Justice in Rwanda*, 12 CRIM. L. FORUM 371 (2001); Marston Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

\* A great majority of indictees were charged under Article 7(1)'s direct responsibility, but this is an umbrella concept. Around 40 percent of the ICTY's indictees were accused of actually physically perpetrating crimes. More—about 70 percent—were charged with aiding and abetting. JCE was invoked in about 40 percent of cases, and command responsibility in about 70 percent. Ford, *Measuring, Understanding, and Predicting Trial Complexity at the ICTY*, SSRN working paper, 6 July 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101764](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101764); Personal Communication from Prof. Stuart Ford.



\* On JCE, *see* Hartmann, Prelec, Waters 298, 306-07, Meierhenrich 7ff 321-323, 340, Nielsen 335-338, 340, Van der Wilt, Del Ponte 3ff 138, 142, Lamont 205, 207, and 211, and Boas 107-109, 116, 118-119.

<sup>†</sup> *See, e.g.,* Boas at 116.

† See, e.g., *Pros. v. Popović et al.* (1), Judgment (10 June 2010) (noting the Prosecution's two separate JCEs for Srebrenica, one to murder able-bodied Muslim men and the other to remove the Muslim population). Hartmann argues that this is what the Prosecution has done through its changing genocide jurisprudence in its Bosnian cases after *Milošević*.

\* Conspiracy is also a substantive crime in the common law tradition, as well as a theory of liability; in ICL, JCE is not a crime in itself. The ICC's limited jurisprudence has relied more on theories of co-perpetration, influenced more by the civil law.



† *See* DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 36.

Drumbl also makes a similar point in his chapter, arguing that Serbia has benefitted from the individualization of guilt through ICTY trials. *Cf.* Shany and Várady on the potential concerns Serbia may have had about the release of VSO documents in the ICTY's trial.

‡ As noted in [Chapter 1](#), the ICTY is not the only institution holding trials for crimes in the Yugoslav wars, and indeed over time domestic institutions can, as in the case of Nuremberg and domestic German trials, try far more individuals. These institutions also rely on the logic of individualized liability, however, with the same advantages and limitations. For a comparison of the ICTY with an institution that does focus on state responsibility, *see* Shany.

\* *See* Hartmann.

\* Anoya's chapter discusses this office.



† See Anoya and Armatta at 283-284 on the defense function at the ICTY.

\* In 1998, a single team conducted very preliminary investigations of both sides of the conflict. *See* Williamson at 79 and 84-85. But these investigations were not focused on Milošević himself, and by the time they were, in Spring 1999, the team's work was scrupulously segregated, even from teams working on Serb-related cases in Bosnia and Croatia that would later form parts of the trial.

† See Williamson at 85. *See generally* Williamson, Del Ponte, and Askin on the Prosecution's investigations in *Milošević*, and Bassiouni on earlier investigations. *See also* Hartmann on the subsequent history of some of those other investigations for Croatia and especially Bosnia.

‡ *See* Waters at 305–06.



\* Several chapters discuss the enormous documentary record created by *Milošević* and other trials: Nielsen, Prelec, and Waters.

† Trix at 242-244 and 246-247 is highly critical of the effects of written testimony.

† Surroi at 226-227 discusses the effects of a multilingual courtroom—or rather, a courtroom in which multiple languages are used with varying fluency. Trix at 245-246 criticizes the reliance on Serbian place-names.

§ Tadić was taken into custody by the Tribunal in October 1994, but the intervening period was taken up with extensive pretrial proceedings.



\* Bachmann discusses the importance of preexisting perspectives for interpretations of the Tribunal's work.

† MOS is an acronym for the three accused—Milutinović, Ojdanić, and Šainović—who were originally indicted with Milošević for crimes in Kosovo, but later tried separately together with three other senior Serbian military and security officials—Sreten Lukić, Nebojša Pavković, and Vladimir Lazarević. The case, also sometimes known as *Kosovo*, was formerly abbreviated in Tribunal documents as *Milutinović et al.*; however, following the acquittal of Milutinović, the appeal is known as *Šainović et al.* See *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, & Lukić*, IT-05-87-T, Judgment (26 Feb. 2009); *Pros. v. Šainović, Ojdanić, Pavković, Lazarević, & Lukić*, Prosecution Appeal Brief (21 Aug. 2009).

‡ Nielsen and Hartmann in particular extensively discuss these and other cases related to *Milošević*.

§ See, e.g., *Pros. v. Milutinović et al.*, IT-05-87-T, Judgment, Vol. 3, ¶¶ 1206–12 (26 Feb. 2009) (convicting five of the six accused on various charges, but finding that only one, Nebojša Pavković, had sufficient knowledge to be held liable for sexual assaults committed by subordinates, and Vol. 3 at p. 481, Judge Chowhan dissenting); in particular, on Šainović, *see id.* ¶¶ 469, 472, 475–76, 1208; Ojdanić, *see id.* ¶¶ 539ff, 598 (failure to discipline), ¶ 629 (sexual assault), ¶¶ 621–22 (finding that failure to prevent or punish, where there is a duty to do so, can constitute direct responsibility under Art. 7(1), as well as command responsibility under 7(3)); on Pavković, *see id.* ¶¶ 784–85, 787 (finding no need to discuss other forms of liability given findings in relation to direct liability). In all these cases, the Chamber analyzed command responsibility as a residual category, applicable only if liability had not been established under Article 7(1) through a JCE theory. In his trial, Milošević was charged with crimes of sexual violence under both direct and command responsibility. *See, e.g., Milošević case (2)*, Amended Indictment (Bosnia) (22 Nov. 2002) ¶¶ 32, 35(c and e), 39 (listing sexual violence under counts covering genocide, persecutions, crimes against humanity, grave breaches, and violations of the laws and customs of war).



\* Boas at 111-112 discusses the effects that decisions made about joinder during *Milošević* have had on judges' incentives to expedite trials and on the Prosecution's calculations, once the pressures of the completion strategy came into play.

† Greenawalt discusses the Tribunal's relationship to the Security Council, at 379-380, 384.

\* *See* Williamson and Bassiouni on cooperation with and support from NATO.

† Askin and Greenawalt, among others, discuss the specific jurisprudential legacy of the ICTY.



\* One might make a similar argument for Macedonia—that the existence of the Tribunal exercised a constraining influence. And of course, by definition, truly successful deterrence would be largely invisible. Greenawalt at 380 discusses the deterrence logic of ICL.

\* Two chapters that particularly engage Milošević the political actor are Prelec and Nielsen; all the chapters dealing with JCE or the Prosecution's Greater Serbia theory engage the question of Milošević's relationship to the broader political and intellectual scene for the wartime period as well, and several take the view that the ICTY's effort to examine his wartime role also involved consideration of his role in Yugoslavia's dissolution.

\* On the factors in Milošević's rise—which he also sees contributing to his later fall—*see* Bieber at 424*ff.*

\* *See* Prelec, Nielsen, and Hartmann on this.



† *See* Bassiouni and Greenawalt.

‡ Bieber notes the gradual decline in Milošević's popularity in the 1990s, at 425ff.

\* Várady at 460-461 discusses these events, and Pešić the debate among Serbian intellectuals over transfer.

† On his political legacy in Serbia, *see especially* Bieber, Dragović-Soso, and Pešić, as well as Krasniqi.



\* Prior to the 1996 elections, Richard Holbrooke promised Karadžić that the United States would not pursue his arrest if he withdrew from politics; Karadžić himself has asserted that he was promised immunity from prosecution. *Pros. v. Karadžić* (8), Decision on Accused's Holbrooke Agreement Motion (8 July 2009); *Pros. v. Karadžić* (9), Decision on Accused's Application for Certification to Appeal Decision on Holbrooke Agreement Motion (17 July 2009); *see also* Klemenčić, "The International Community and the FRY/Belligerents, 1998-1997," *in* *CONFRONTING THE YUGOSLAV CONTROVERSIES* 187 (Ingrao & Emmert eds.) (noting that Milošević himself was instrumental in bringing pressure to bear on Karadžić to withdraw from public life, in order to maintain the strategic support of the United States). Bassiouni discusses Holbrooke's role, at 100-101, and Greenawalt does at 381-382.

\* *Cf.* Bassiouni and Greenawalt on this point. Del Ponte also discusses the difficulties of developing a defensible indictment.

† I worked in the Prosecution at the time, and regularly heard such arguments made.

‡ Bassiouni, Williamson, and Greenawalt are all relevant here.



\* Williamson and Bassiouni represent, in a sense, these two interpretations. On the indictment more generally, see also Meierhenrich 319-320, 323-324, Greenawalt 379-384, Askin, Del Ponte, Mégret, and Boas 107-108.

† Pešić and Dragović-Soso analyze significant episodes during this period, which Bieber also covers.

‡ See Várady at 460-461.

\* Milošević also challenged the legitimacy of the ICTY, and of his detention, in Dutch and European courts. *See, e.g.,* ECHR, *Milosevic v. The Netherlands*, App. no. 77631/01 (19 Mar. 2002) (rejected as inadmissible due to non-exhaustion of domestic, that is Dutch, remedies). Earlier, Milošević had lost his case before a Dutch District Court, then withdrawn his appeal. *Milosevic v. The Netherlands*, KG 01/975 (Neth.) (31 Aug. 2001).



† These indictments were each separately amended in November 2002, though by this time they were parts of the joined indictment.

‡ *Pros. v. Milošević* (10), Decision on Prosecution's Motion for Joinder (13 Dec. 2001), [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/11213JD516912.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/11213JD516912.htm); *Pros. v. Milosevic* (25), IT-99-37-PT, IT-01-50-PT&IT-01-51-PT, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (1 Feb. 2002). The indictment against the four others originally indicted with Milošević had been severed and formed the basis for the *MOS* trial.

§ On the opening phase, *see* Trix 232-237, Krasniqi 215-218, and Bieber 420-422.

\* Bachmann and Armatta address the media's role in the trial, including the close attention paid to its earliest phases.



† In fact with a 30-minute delay, used to ensure that confidential information would not inadvertently be revealed.

† *See* Bieber at 420-424-on the broadcast history of the trial.

§ *Pros. v. Milošević* (22), Order Inviting Designation of Amicus Curiae (30 Aug. 2001). Three *amici* were appointed by the Registrar in September 2001. In late 2004, when the defense phase began, the Chamber imposed counsel on Milošević, appointing the same lawyers who had previously served as *amici*. *Milošević case* (72), Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004),

[http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040922.htm#37](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040922.htm#37)

(setting out the reasons for the oral ruling of 2 September 2004);

*Milošević case* (50), Order on Modalities (3 Sept. 2004),

[http://www.icty.org/x/cases/slobodan\\_milosevic/tord/en/040903.htm](http://www.icty.org/x/cases/slobodan_milosevic/tord/en/040903.htm).

\* *See* Bieber at 425-428.



† *Cf.* Shany on the conflicts between individual and collective responsibility, and Drumbl on the strategic advantages collective political communities may gain from ICL's individualized model.

\* On the size and scope of the trial, *see* Meierhenrich at 318-319. All chapters dealing with the JCE and joinder also necessarily engage the problem of the trial's huge scope.

\* *See* Williamson at 85-86, 87-88.

† It was not necessary for a conviction for Milošević to have direct knowledge of each killing, rape, or deportation. The Prosecution did have to prove his awareness of events in general, and actually had to spend a considerable amount of time on what, to a layman, would seem an obvious proposition.



‡ See Del Ponte's account of the Prosecution's considerations before and during the trial, including, at 137-138, 142-143, 144-145, her discussion of the decision to start with crime base evidence.

\* On JCE, *see* Hartmann, Prelec, van der Wilt, Waters, Meierhenrich at 321-323, Nielsen at 335-338, Del Ponte 138, Lamont at 205-207, 211, and Boas at 107-109. On Greater Serbia, *see* Prelec, Boas at 108-110, 113-114, 116, Waters at 297, Nielsen at 339-342, Hartmann 469, Bieber (Response), and Mégret at 123, 126, 132-134.

† Boas critically discusses the joinder decisions, which Mégret defends to a greater degree. Other chapters that discuss joinder include van der Wilt, Bieber (Response) at 350-351, Waters, Askin at 153-154, 156, and Del Ponte at 138, 142-143.

‡ This understanding of ICL's purposes intersects with rising claims about a human "right to truth." See Naqvi, *Right to the Truth in International Law: Fact or Fiction?*, 88 INT'L REV. RED CROSS 245, 248 (2008) (discussing UN Commission on Human Rights Resolution 2005/66, which "[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights").



\* *See* Del Ponte at 143-144.

† *Milošević case* (1), 98bis Decision ¶ 313. The Chamber ordered acquittal on all specific incidents alleged except the shooting of Seid Solak and the notorious *Markale* incident that killed 66 people. *Id.* at ¶¶ 310–15. Waters discusses the Chamber’s ruling, and the *Amici*’s likely reasoning for leaving one count each of sniping and shelling unchallenged, at 304-305.

‡ For example, although Milan Milutinović was President of Serbia during the Kosovo conflict, he was acquitted in the *MOS* trial, largely because he lacked actual, effective control over the VJ and MUP forces doing the killing. *Pros. v. Milutinović et al.*, IT-05-87-T, Judgement Vol. 3, 42–114 (26 Feb. 2009).

\* See WILSON, WRITING HISTORY 109 (calling the *Milošević* Prosecution's reliance on historical argument the "high-water mark (or nadir, depending on your point of view) of historical argumentation by the prosecution at the ICTY").



† Such witnesses constitute an important subject of the chapters by Del Ponte, Trix, Krasniqi, Surroi, and Kostovicova.

‡ In her chapter, Del Ponte concedes that the Prosecution's decision to start with crime base evidence rather than evidence of Milošević's leadership role was an error, at 142-143.

\* Surroi, Del Ponte, Krasniqi, and Trix all note the rhetorical imbalance and its effects in the *Kosovo* phase.

† Del Ponte, Askin, Armatta, Trix, and Shany (Response) are all variously critical of the scope given to Milošević.



\* *See* Trix and Armatta.

† Just such a confidentiality ruling formed the basis for the contempt conviction of one of this volume's authors, Florence Hartmann.

‡ There were 75 protected witnesses and 262 unprotected witnesses. Protection does not mean total exclusion of access; the testimony of some protected witnesses is available, with the identities disguised.

§ Bieber and Hartmann discuss the impact of the broadcast of the *Škorpioni* killings.



\* Waters, Nielsen and Meierhenrich, and Bieber (Response) at 354.

† On Milošević's self-representation, *see* Anoya, Shany (Response), Del Ponte at 140-141, 145-148, Askin at 15-156, and Armatta at 283.

\* *See Anoya.* Milošević was allowed additional facilities and privileged communications, including computer and phone connections, in order to conduct his defense. These privileges also may have facilitated his efforts to medicate himself or to counteract the effects of his prescribed medical treatment. PARKER REPORT.

\* *Cf.* Shany (Response), arguing for a balance between self-representation rights and institutional interests in effective trials.



† The new counsel themselves argued, successfully, for the right to file an interlocutory appeal against their own appointment as counsel, on the grounds that the Accused had objected and expressed a desire to appeal. Although an entirely correct thing to do, this hardly suggests that anyone believed the new counsel were capable of acting effectively as zealous advocates for the Defense.

\* Del Ponte's chapter at 140-142 is an example of these critiques, as is Armatta's. On the judges, see also Boas, Waters at 305-307, Anoya, Askin 152-154, and Meierhenrich.

† *Milošević case* (72), Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004); *Milošević case* (14), Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (1 Nov. 2004). *See also* *Milošević case* (73), Reasons for Decision on Assignment of Counsel (4 Apr. 2003) (rejecting the Prosecution motion to impose defense counsel because of the adversarial character of the proceedings and the existence of a right to defend oneself, and noting Milošević's competence, health, and conduct did not preclude a fair and expeditious trial). The Prosecution made further requests that the Chamber impose counsel. *See, e.g.,* *Milošević case* (57), Prosecution Motion for a Hearing to Discuss the Implications of the Accused's Recurring Ill Health (23 Sept. 2003).

\* Had Milošević died during the appeals process, the Trial Chamber's judgment would still have been recorded. On the termination, *see* Waters, Nielsen, Del Ponte, Bieber (Response), Swimelar 190ff, and Boas at 106.



\* *Cf.* Nielsen, Bieber (Response), and Waters for varying perspectives on this point.

\* Ambassador Clint Williamson is Chief Prosecutor for the EU Special Investigative Task Force. Formerly a Special Expert to the Secretary-General of the United Nations, he has served as the U.S. Ambassador-at-Large for War Crimes Issues, the Director of the Department of Justice in the UN Mission in Kosovo, and a Trial Attorney at the ICTY from 1994 to 2001.

\* Indicative of this was a telephone call Arbour received from U.S. Special Envoy Richard Holbrooke shortly after we arrived in Skopje; Holbrooke said that Arbour should stay where she was as her presence there was putting incredible pressure on Milošević.

\* Despite the unified front in support of Walker, some outside observers criticized him for having exceeded his role as a neutral monitor and for, in fact, using the events at Račak as a pretext to press for military action. *See* Press Release, Media Ignore Questions about Incident That Sparked Kosovo War, FAIR.ORG (Fairness and Accuracy in Reporting) (1 Feb. 2001), <http://www.fair.org/index.php?page=1877>.

\* Stat. ICTY, Art. 1. The Security Council determines when the conditions for the ICTY's jurisdiction will terminate; within that framework, the Prosecution and the Chambers determine the scope of that jurisdiction and its application to particular situations.



\* Prelec, who joined the case after this point, presents a different view of Milošević's responsibility, though one he also acknowledges developing later in the case.

\* Prelec, Hartmann, and Nielsen discuss the various forms of support and control exercised by the VJ, SDB, and other elements of the FRY and Serbian governments over Serb forces in Bosnia and Croatia.

\* Hartmann describes an analogous process working in reverse in the post-*Milošević* trials of Belgrade-based figures, who were described as part of a broader joint criminal enterprise or JCE under Milošević in his trial, but as subordinated to Bosnian Serb leadership in their own trials and in *Karadžić*.

\* Surroi describes the earlier meeting, at 222-224.

\* The victims whose names were known are listed in *Kosovo* Indictment, Schedule A.



† Contrast this approach with how, in her chapter, Del Ponte describes her decision-making process for the *Bosnia* phase genocide charges, which were also the subject of debate with the Prosecution.

\* *See* Trix at 246 and 555, n. 95 for a critique of the indictment's choice to adopt Serbian nomenclature and the Usage Note at xxiii-xxv for further discussion of the issue.

\* Greenawalt discusses claims about the strategic interaction between the indictment and the war, at 383-384.

† Serbian institutions continued to operate in some of the enclaves, and especially in the area north of the Ibar river.

‡ *See* discussion in Bieber.



§ Some notable examples of insider witnesses include Aleksander Vasiljević, Ratomir Tanić, Milan Babić, and Slobodan Lazarević.

¶ *See Várady's and Pešić's chapters on this episode.*

\* Distinguished Research Professor of Law *Emeritus* and President *Emeritus*, International Human Rights Law Institute, DePaul University; President, International Institute of Higher Studies in Criminal Sciences; and Honorary President, International Association of Penal Law. Between 1992 and 1994 Prof. Bassiouni was a member and then chair of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) to investigate violations of international humanitarian law in the former Yugoslavia.

\* The third Prosecutor, Carla Del Ponte, has claimed that neither of her predecessors—Richard Goldstone and Louise Arbour—had filed an investigation on Milošević, and that the only thing she found in his files were the Final Report and Annexes of the Commission of Experts, and newspaper clippings about Milošević. DEL PONTE & SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS; personal communication with Carla Del Ponte, The Hague (late 1999 or early 2000); *see also* HAZAN, JUSTICE IN A TIME OF WAR 149 (Snyder trans.). Even on Williamson's account, there was not much there before late 1998.

† Mr. Eagleburger told the media that he had decided to “name names” after meeting with a Holocaust survivor who called for the punishment of war criminals so that these kinds of crimes would not continue to be carried out. SCHARF & SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 25 (2002).



\* *See generally* Baumann, “From UNPROFOR to IFOR,” *in* ARMED PEACEKEEPERS IN BOSNIA 37ff. There were incidents of hostage-taking during the Bosnian war, but the most egregious example of how lightly armed peacekeepers became obstacles to resolute action—and levers for influence on policy—involves the Dutch forces guarding Srebrenica. *See* ROHDE, ENDGAME: BETRAYAL AND FALL OF SREBRENICA; Schröder, *Dealing with Genocide: A Dutch Peacekeeper Remembers Srebrenica*, SPIEGEL.DE, July 12, 2005. Richard Holbrooke expressed the view that “the British, the French, and the Dutch cut some kind of private deal, the details of which are not recorded, but which must have happened, that they would use their position within NATO to veto any air strikes until the Dutch troops were safely out of Srebrenica.” LEBOR, COMPLICITY WITH EVIL 234.

† LEBOR, COMPLICITY WITH EVIL 32. A striking example is the history behind Resolution 836, which relied on a French memorandum to create the safe areas in Bosnia without providing for a robust protection mandate. London and Paris engaged in extensive lobbying efforts to persuade all members of the Security Council to vote for it. LEBOR, COMPLICITY 52–55.

\* Milošević displayed his awareness of the history of German interests in the Balkans in his opening defense statement, alleging Germany's desire to destroy Yugoslavia and create a series of small satellite states in the region, which Germany could dominate. *See* MILOSEVIC & CLARK, THE DEFENSE SPEAKS: FOR HISTORY AND THE FUTURE 25–26, 40–44.

† These included the Soros Foundation, the Open Society Fund, and the John D. and Catherine T. MacArthur Foundation. The original documentation center for evidence collected in the former Yugoslavia was located at DePaul University's International Human Rights Law Institute. Eventually, a UN trust fund for the Commission was established by 13 countries in the amount of 1.3 million dollars. This allowed for exhumations, extensive interviewing, materials, and a forensics expert. *See* SCHARF, BALKAN JUSTICE 45–49.

\* The Commission officially began its work in November 1992, but little happened until April 1993 when the Commission began establishing contacts with authorities and obtaining information from the region. *See* Commission Final Report, Lists of Missions Undertaken by the Commission, U.N. Doc. S/1994/674/Add.2 (Vol. I), Annex I.B (Dec. 28, 1994),

[http://www.law.depaul.edu/centers\\_institutes/ihrli/downloads/Annex\\_IB.pdf](http://www.law.depaul.edu/centers_institutes/ihrli/downloads/Annex_IB.pdf).



† For a general discussion of the military structures of the warring parties, see Commission Final Report, ¶¶ 110–28 & Annex III (The Military Structure, Strategy and Tactics of the Warring Factions); *see also* chapters by Prelec, Hartmann, and Nielsen on the links between Belgrade and the VRS.

\* The Final Report does not contain any direct evidence of orders from Milošević or direct information going to Milošević in relation to the shelling, and it is logically possible to explain the correlation by actions taken at the level of Pale, not Belgrade. However, the Report does analyze links from the *Romanija* Corps to the VJ, and as we will see in the Conclusion, it requires only the same JCE theory that the Prosecution later applied in the *Bosnia* phase to explain the relationship to Milošević. *See* Commission Final Report, ¶¶ 184–86; *see also Pros. v. Galić*(2), Judgment (5 Dec. 2003). Waters discusses the fate of the charges related to the shelling and sniping of Sarajevo, at 303-305.

\* Ralph Zacklin, a senior UN official of British nationality, was aware that Escovar could not take up his duties for at least several months, but had advised him to remain in the post without advertising the fact of his unavailability. Personal communications with Ramon Escovar Salmon and Boutros Boutros Gali, Geneva, early 1994. *See also* BASS, STAY THE HAND OF VENGEANCE 218–19 (giving an account of Escovar’s appointment and resignation).

† I was also, at that time, a candidate for the position, having been nominated by Egypt and supported by Secretary General Boutros-Gali. *See WILLIAMS & SCHARF, PEACE WITH JUSTICE 107* (discussing British objections to my candidacy based on my willingness to prosecute senior Serb leadership); *see also* BASSIOUNI, *LAW OF THE ICTY*.

\* The Prosecution's willingness to indict Karadžić and Mladić—including for the siege of Sarajevo, which by this point was several years old—suggests either that it had finally built a case or, more plausibly, that, with the shift in NATO strategy, Goldstone now understood indictments were feasible and increasingly welcome. *See* Greenawalt at 380-383 advancing a similar interpretation.



† The more outré speculation posits a much grander and more cynical deal, reached not at Dayton but early in 1995, in which the United States took a much more active role in managing the endgame of the wars: Serbia would abandon the RSK, and in exchange, the Bosnian Serbs would be allowed to consolidate the Drina corridor. There is, of course, no evidence of any such arrangement, but there is no reason to descend into conspiracy theories to observe how the logic of the U.S. strategy could achieve a similar outcome: After the fall of Srebrenica, the United States denounced the Bosnian Serb leadership but not Milošević. Even without an explicit guarantee, U.S. behavior was consistent with developing its strategy of relying on Milošević to deliver the Bosnian Serbs at the negotiations.

\* There is neither reason nor evidence to suppose that Arbour brought the indictment when she did at NATO's behest or even in coordination with it, and in my own experience I found Arbour to exhibit the utmost integrity and professionalism. This does not mean, however, that NATO powers had no ability to influence, through punishment or reward, the work of the Tribunal. The indictment, which indirectly and retroactively justified NATO's campaign, was issued at a time when Arbour—a senior Canadian judge—was rumored to be a potential appointee to the Canadian Supreme Court. We can only speculate on the outcome of that process if the Prosecution had not issued an indictment, or had even publicly entertained with any seriousness the calls of NATO's critics to indict the alliance for its actions. In the event, however, Arbour was appointed to the Canadian Supreme Court a few months later. *See* SCHARF & SCHABAS, SLOBODAN MILOSEVIC ON TRIAL 103.

\* Del Ponte raised this point when pressed by reporters about the time it was taking to indict Milošević for crimes committed in Croatia and Bosnia—and that at a time when NATO was fully cooperating with the Tribunal. *See* HAGAN, JUSTICE IN THE BALKANS 222.

\* On the use of JCE in the actual trial, *see* Meierhenrich 321-323, Nielsen 335-338, Van der Wilt, Del Ponte 138-139, Prelec, Lamont 205-207, 211, and Boas 107-109.

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\* This indictment was amended twice more. *Pros. v. Milošević* (35), Trial Tr. 69 (29 Oct. 2001); *Pros. v. Milošević* (23), Second Amended Indictment, Attachment A (16 Oct. 2001). The final version of the indictment, which was the operative version for the *Kosovo* phase, will be referred to as the “*Kosovo* indictment.” The cases of the others accused in the original indictment—Colonel General Dragoljub Ojdanić, Serbian Minister of Internal Affairs Vlado Stojiljković, FRY Deputy Prime Minister Nikola Šainović, and Serbian President Milan Milutinović—were later severed from Milošević’s, as will be discussed further below.

† Indictments must be reviewed by a judge who, “if satisfied that a *prima facie* case has been established by the Prosecutor,” shall confirm the indictment. Stat. ICTY, Art. 19. *See also* ICTY, R. P. & EVID., IT/32, R. 47(E) (“The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine [applying the *prima facie* test] whether a case exists against the suspect.”). The Tribunal has defined a *prima facie* case as “a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge” (*Pros. v. Kordić, Blaškić, Čerkez, Šantić, Skopljak, & Aleksovski*, Decision on the Review of Indictment, 3 (10 Nov. 1995)).

\* Compare Williamson's and Bassiouni's differing accounts on this period.

† *Pros. v. Milošević* (1), IT-01-50, Order Confirming Indictment (8 Oct. 2001). It was later amended, *Milošević case* (45), Order Granting Leave to Amend Croatia Indictment (4 Nov. 2002). The sole change to the initial *Croatia* indictment was a reduction in the allegations in paragraph 36 dealing with the charge of persecution. On 28 July 2004, the Trial Chamber confirmed that the second amended indictment was the operative version for the *Croatia* phase. *Milošević case* (47), Order Modifying Second Order to Amend the Croatia Indictment (28 July 2004).

‡ *Pros. v. Milošević* (4), Decision on Review of Indictment (22 Nov. 2001). It was also later amended, *Milošević case* (58), Motion to Amend Bosnia Indictment (22 Nov. 2002). This version was explicitly confirmed as the operative *Bosnia* indictment. *Milošević case* (49), Order on Amended Bosnia Indictment (21 Apr. 2004).



\* Prelec also addresses the Prosecution's characterization of Milošević's responsibility, though from a narrative perspective, rather than as a question of its doctrinal fit with joinder.

† See Waters, Meierhenrich, and Nielsen on the Chamber's Rule 98*bis* Decision on the *Amici's* motion to acquit.

\* The Completion Strategy emerged from Security Council resolutions calling on the Tribunal to adopt all possible measures to complete investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all work including appeals by the end of 2010—a timetable that clearly has not been achieved. *See* S.C. Res. 1503, U.N. Doc. S/RES/1503 (28 Aug. 2003); S.C. Res. 1543, U.N. Doc. S/RES/1534 (14 May 2004).

† By an allegation of JCE, the Prosecution contends that the accused intentionally participated in a common plan, design, or purpose together with one or more other persons involving the perpetration of some crime within the jurisdiction of the Tribunal; this form of responsibility is unique to international criminal law. The “same transaction” requirement will be discussed below.

\* *See* Trix for a linguistic and normative critique of this practice.



\* The Prosecution had filed, on 20 December 2001, an “Application for Leave to File an Interlocutory Appeal,” which the Appeals Chamber granted on 9 January 2002.

\* In reviewing a Trial Chamber's ruling, the Appeals Chamber will consider whether that Trial Chamber erred in the exercise of its discretion. Although the Appeals Chamber has stated that it will treat rulings of the Trial Chamber deferentially in such matters, the practice tends to contradict this general proposition. For a discussion of the standard of review for interlocutory appeals before the ICTY (and other Tribunals), see BOAS, BISCHOFF, REID & TAYLOR, INTERNATIONAL CRIMINAL PROCEDURE 439–41. The standard of review for the Rule 98*bis* Decision is discussed in Waters, Nielsen, and Shany, which similarly distinguishes between what a theoretical Chamber *could* find and what the actual Chamber *would*.

† Although a single JCE was alleged for all three indictments, there is no overlap between the members involved in Bosnia and Croatia, on the one hand, and Kosovo on the other, apart from Milošević himself. The indictments do refer to “other known and unknown participants” (*Croatia and Bosnia*) or “others known and unknown” (*Kosovo*). See *Pros. v. Milošević* (2) *Croatia* Indictment, Art. 7; *Pros. v. Milošević* (3) *Bosnia* Indictment, Art. 7; *Pros. v. Milošević* (23) *Kosovo* Indictment, Art. 17.

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\* It is difficult to ascertain what Milošević wanted given his noncooperation with the Chamber. Nonetheless, Milošević made no comment specifically against the joinder, whereas he vocally challenged some elements of the trial, such as the Tribunal's authority. When pressed by Judge Jorda on the question whether he opposed the joinder, after several long monologues, Milošević answered in a way that suggested he did not particularly care: "I think that these indictments, which are obviously false, should all be dismissed. I never heard of indictments without supporting evidence. I never heard of indictments that resemble political pamphlets with poor, bad intentions." *See Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 351-3 (30 Jan. 2002).



† Interestingly, this should remind us that someone such as Milošević, who personally probably entertained few doubts about his chances of acquittal on all or even any of the charges, was more interested in a “political” defense than a traditional criminal law defense. Although Milošević was loath to signal this in so many words to the Appeals Chamber (despite being pushed insistently to declare whether he personally favored a joint trial), he often effectively seemed to treat all of the accusations that were made against him as part of an overall conspiracy against the Serbian people. His defense on all three indictments would probably have been very similar in practice, further weakening arguments that a single trial would have imposed an undue burden upon him.

‡ Wladimiroff also noted that a “single trial will probably allow the accused a better opportunity to reconsider his position and to see his position in a more relevant way”—though “reconsideration” may suggest that Wladimiroff, at least, thought Milošević was opposed. *Pros. v. Milošević* (30), Public Transcript of Hearing 111 (11 Dec. 2001). This is an example of the *Amici*’s “imperfect identity” with Milošević, which Waters discusses at 302-303.

\* In any event, Milošević was fully cognizant of the various indictments against him long before joinder became an issue.

† The idea was that in a joint trial the *Kosovo* part of the indictment would have been the last to be presented, giving ample room for further preparation, and that a joint trial would probably start later than a single trial. In the event, of course, the Appeals Chamber ordered the Prosecution to proceed with *Kosovo* first. Also, as Williamson's and Bassiouni's chapters indicate, investigations related to Kosovo actually had begun first, and therefore had been afforded the most time to be prepared.

‡ This is a point that Judge Jorda made during the appeal hearing: “You are putting a great deal of energy into demonstrating the scheme and the common design. What I would like to know is how could that common design—why was that not put forward earlier on? ... How can one speak today about a great common scheme, common design, whereas your own office did not consider them so single when the—when the indictments were drawn up at the time of preparing the indictments?” *Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 328 (30 Jan. 2002). Indeed, it seems that the Prosecution thought of the idea of the plan when it decided—presumably for other reasons—to seek joinder, rather than the other way around.



§ Indeed, Del Ponte's strategic concerns were not actually raised by the Prosecution in court.

¶ Evidence of this is hard to come by—all kinds of variables are involved, and the joint character of proceedings cannot be the sole factor affecting length. But the conclusion seems intuitive: individual defendants have to sit through large parts of a trial not directly related to them.

\* The second scenario has not materialized before international tribunals, whereas the first was not at issue in *Milošević* as the *Bosnia* and *Croatia* indictments were introduced soon after the *Kosovo* indictment, before trial began.

† The Appeals Chamber in the *Milošević* joinder decision hinted at this when it suggested that the Prosecution has a role in ensuring that trials do not drag on, for example by making use of Rule 92*bis* to reduce evidentiary burdens. Appeals Chamber Decision ¶¶ 24–25.

\* This was true for many witnesses Milošević wanted to call as well—another reason joinder's valence is neutral.



† Unlike the ICC, the ICTY does not have institutional provisions for including victims, as such, in the proceedings.

\* During the appeal hearing, some ambiguity emerged on precisely that point. Consider for example the following reaction by Judge Hunt to the presentation made by Mr Kay, as *Amicus*: “Mr. Kay, as I understood your colleague’s [Wladimiroff’s] presentation, he said that you should not base it upon the Greater Serbia argument because it was not a true fact. Now, surely we’re not going to determine that issue at this stage. The allegation—let’s assume the allegation is sufficiently made in the indictments that this was all part of a strategy to make Serbia pure. We don’t have to determine whether that’s true in order to determine whether it’s convenient or proper or mandatory that they all be tried together.” *See Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 370 (30 Jan. 2002).

† This is why *Amicus* Kay sought to shift the debate away from the Greater Serbia footing on which the prosecution had put it, and toward a joinder based on commonality of modus operandi. *Amicus* Tapušković, for his part, criticized the idea of Greater Serbia very much on substantive grounds.

\* Joinder with *Karadžić* or *Mladić* would have presented different procedural problems, as those defendants were unavailable.

† This is Prelec's argument, in part—and also, in a sense, Hartmann's critique of the Prosecution's post-*Milošević* strategy.



‡ For instance, although the conviction of Saddam Hussein on charges stemming from his role in the Dujail massacre and Anfal campaign has been criticized as too narrow given the full range of the crimes he could have been prosecuted for, it did arguably have a significant impact in terms of the ongoing campaign of de-Baathification. *See also* Nielsen and Waters on the value of a trial's procedural elements and its final judgment.

\* As Pešić notes, this was what the authorities in the FRY suggested doing—prosecuting Milošević for offenses of abuse of power and financial corruption under domestic law, rather than for war crimes, and without transferring him to the Tribunal. *See Milošević Arrested*, BBC NEWS, 1 Apr. 2001. The *Hussein* trial illustrates the dangers—although perhaps also the merits—of such an approach. Saddam Hussein was successfully prosecuted for the massacre at Dujail and the Anfal campaign, but not for a variety of other charges. By the time the first two trials had been conducted, Hussein's execution made any further prosecution moot. *See Kress, The Iraqi Special Tribunal and the Crime of Aggression*, 2 J. INT'L CRIM. JUST. 347 (2004).

\* Of course, as we have seen, the mere fact of joinder might contain a risk of prejudice to an accused, but this is a risk inherent to criminal trials. It is analogous to the way in which indictment, pretrial detention, and the trial itself may operate: These judicial practices carry a real risk of prejudicing opinion, but they are pragmatically necessary and unavoidable if the substantive issue of legal responsibility is ever to be determined. We do not analyze the detention and trial of a person ultimately acquitted as an injustice, but as part of a process necessary to establish whether that person's guilt could be established beyond a reasonable doubt.

<sup>†</sup> *See* Van der Wilt, in particular on JCE.

\* The Appeals Chamber's analysis relied on the ordinary meaning of words, but also an *ad absurdum* interpretation (the meaning of "transaction" as specified in Rule 2 allows for the occurrence of acts in different locations but there is no logical explanation why acts occurring at different times should not also be included), and an interpretation based on a potential incompatibility between the English and French versions. Appeals Chamber Decision ¶¶ 13–18. Boas, at 115-116, examines the Chambers' reasoning in detail, though arriving at a different interpretation.



† The Prosecution made the point that at the time the events described in the *Croatia* indictment began, Croatia was still part of Yugoslavia and therefore not in a situation that different from that of Kosovo in 1998. *Pros. v. Milošević* (29), Public Transcript of Hearing 305 (11 Dec. 2001). The fact that Kosovo has since proceeded toward independence, albeit at a much slower pace, shows that the difference is relatively minor and arbitrary.

\* The reproach heaped on the use of “Greater Serbia” to subsume the *Kosovo* indictment can be overblown: Kosovo was indeed already a province of the Republic of Serbia, and therefore actions there could not strictly be seen as expansionism, yet Milošević’s actions in Kosovo were arguably the continuation of a long process of Serb domination of the Albanian minority. (In this vein, it is interesting to consider that the Serbian term *Velika Srbija*—commonly translated as “Greater Serbia”—would be more accurately rendered as “Great Serbia,” a reading that would be more amenable to the idea of maintaining as well as expanding Serb power. Thanks to Christian Nielsen for the grammatical point.) Historians of nationalism in the Balkans and of Milošević’s career know only too well how his “You will not be beaten” speech at Kosovo Polje in April 1987 was a turning point in a career that made him the repository of Serbs nationalist hopes. What started in Kosovo in 1987, in a sense, ended in Kosovo in 1999—at least, this is a plausible narrative of the Yugoslav wars that the Prosecution advanced, the very discussion of which in court contributes to a fuller understanding of those events.

† The Appeals Chamber does suggest that there is some sort of weighing process involved: “In the view of the Appeals Chamber, any possible prejudice to the accused in facing one trial (and it sees none of any significance) is completely outweighed by the fact that a substantial body of evidence relevant to the issue of the acts and conduct of the accused himself in the Croatia and Bosnia trial is also relevant to that issue in the Kosovo trial.” Appeals Chamber, *Pros. v. Milošević* (13), Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder ¶ 30 (18 April 2002).

\* One can debate which was the right indictment to begin with, but as we have seen, this question clearly would have taken on even greater significance with separate trials, a factor that the *Hussein* trial—in some ways a response to the excessive length of *Milošević*—perhaps overlearned to the point of politically prioritizing trial for certain crimes over others. *See* Trix at 245 on this point, criticizing the choice to begin with Kosovo.

† If conviction were the priority, the Prosecution could also have chosen to prosecute only a limited number of counts, rather than seeking to convict Milošević of every crime he could conceivably be accused of or aiming for geographic coverage of all affected areas.



† The rule seems to have been drawn from the “same transaction” test as it exists in federal U.S. law. *See Pros. v. Milošević* (10), Decision on Prosecution’s Motion for Joinder ¶¶ 29–30 (13 Dec. 2001).

\* The Appeals Chamber itself shifted subtly from reference to a “long term plan” to reference to a “long term aim,” which may be more appropriate. Geoffrey Nice also conceded the fungibility of the concept in court: “I think I put it somewhat differently, and I put it this way: Plan—and these words are always sometimes interchangeable—or purpose, whatever, but plan in the mind of the accused....” *Pros. v. Milošević* (11), Interlocutory Appeal Hearing, Trial Tr. 313 (30 Jan. 2002).

\* “Interests of justice” standards have started making their way into international criminal justice, for example in the Rome Statute, Arts. 53(1)(c), 53(2)(c), 55(2)(c), 61(2)(b), 65(4), 67(1)(d). Rome Stat. ICC, U.N. Doc. A/ CONF.183/9. If the standard were ever to change, a better standard for joinder might involve a “chapeau” clause highlighting whether it would be in the “interest of justice,” followed by a number of scenarios where this could be presumed (“same transaction,” “common plan,” and the like).

\* Carla Del Ponte was Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia from 1999 to 2007 and the International Criminal Tribunal for Rwanda from 1999 to 2003.

\* *See* Greenawalt at 380-383, discussing a similar argument about how the availability of evidence and likelihood of apprehending an indictee affect prosecutorial calculations.



† See Williamson at 77-80, 86-88 and 91 on the difficulties of investigating without access to Serbia in the earlier stages.

‡ After being interviewed by the Prosecution as a suspect from late 2001 to early 2002, Babić agreed to testify in *Milošević*. Babić later pled guilty to a count of persecution in January 2004 and was sentenced to 13 years' imprisonment. *See Pros. v. Babić* (3), Sentencing Judgment ¶¶ 2–3 (29 June 2004) (“[i]n November 2002 Babić testified for twelve days in *Milošević*, initially as a protected witness and then publicly during the last two days of his testimony”).

\* *Milošević* was hardly the only long trial. Indeed, the *Kordić & Čerkez* case lasted 20 months; *Stanišić* was several times delayed due to the ill health of the defendant; and although Blaškić's trial started in 1997, Trial Chamber I gave its verdict in 2000 and the case was in appeal until 2004. Vojislav Šešelj has been in detention for even longer, his trial frequently delayed, often owing to his own obstructionism. *See, e.g., Pros. v. Šešelj* (11), Public Redacted Version of "Judgement" (31 Oct. 2011). The recent removal of one of the judges from his case threatens still further delays.

\* The fact that victims were not represented in the *Milošević* trial is a serious shortcoming in the Statute and the RPE. Apart from serving as witnesses, victims had no opportunity to express their opinion, or to get compensation for their suffering. This was particularly shocking in Milošević's case, because we found accounts with a lot of money and blocked them, but there was no legal way to transfer the money so that the victims could have benefited. (At the ICTR there was the same problem, and there was a discussion about creating a rule that would allow the transfer of money to the victims, but the idea was rejected.) The Rome Statute of the ICC constitutes progress in this regard, with its creation of a trust fund for victims and the participation of the victims in the trial. *See* Rome Statute of the International Criminal Court Art. 68(3), 17 July 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

\* *But see* Trix for a critique of the trial's reliance on written testimony.



\* Surroi mentions this phenomenon, as well as the power imbalance between Kosovar witnesses and Milošević, at 226-227.

\* In the course of examination, Prosecutor Nice produced an earlier statement Marković had made to the *Ministarstvo unutrašnjih poslova* (Ministry of Internal Affairs or MUP), confirming the extent of Milošević's knowledge of and control over activities in Kosovo:

MR. NICE: (...) In addition to the main topic of the meeting, at the very end of the meeting, Vlastimir Djordjevic raised the issue of the removal of Albanian corpses in order to remove all civilian victims, if there were any, who could become objects of an investigation conducted by The Hague Tribunal. In that respect, Milosevic ordered Vljako Stojilkovic to take all necessary measures to remove the corpses of the Albanian civilians that had already been buried.

*Milošević case* (127), Trial Tr. 8722:23-25, 8723:1-4 (26 July 2002).

On cross-examination by Milošević, however, Marković uniformly agreed with the former president, ultimately discrediting the statement and eliminating his value as a prosecution witness:

Q. (...) Is it true that this statement that has been presented about the mopping up of the terrain was drafted precisely by the same people and under the sponsorship of those people who exerted pressure on you and who have been torturing you for one year and a half now.

A. Yes, it's an interview with the same people.

Q. I have noted down your words related to this matter. You said it was a liberal interpretation on their part, that you discussed the mopping up in an informal conversation with Ilic, that what was said was mostly gossip, and that nobody, Ilic or you included, ever talked about removing corpses from Kosovo. So could it be said that this statement is a fabrication by the same people who conducted these interviews?

A. Unfortunately, I did not read that statement before I signed it, and it is not really in the format of the statement. It was a conversation, an interview, in which we were looking for a way out of the problems that were facing the Ministry of the Interior. After that, an official, officer of the state security service drafted this paper, and later, when

it was presented to me by the Office of the Prosecutor of the Hague Tribunal, I pointed out certain details which did not tally with the truth. And after that, I gave my statement to the investigators of the OTP, which I assert is true and correct.

Q. Okay. Let's get one thing clear: At this meeting about which they made this statement, did I ever mention in any way removing traces of crimes?

A. No. You approved the mopping up, the clean-up.

Q. Is it true that the mopping up or clean-up means a lawful procedure consisting of those elements which you mentioned in chief, that is, removal of mines and explosives, removal of chemicals, removal of dead bodies, taking care of the wounded, repairing infrastructure, service lines, et cetera, that is, creating—restoring life back to normal after combat operations? Is that correct?

A. Yes. That is what clean-up means, what it implies.

*Milošević case* (129), Trial Tr. 8766:22-25, 8767:1-25, 8768:1-6 (26 July 2002). Milošević also asked, "Is it true that they offered you a new identity, money, and sustenance for you and your family only so that you would falsely accuse me? Is that correct?" Marković answered "Yes, that's correct." *Id.*, Trial Tr. 8765:9-12.

\* In the course of testimony by Dragan Vasiljković, founder of the *Knindže*, Judge May explained the Chamber's logic, which both relies on the common law and departs from it, though not to the Prosecution's advantage:

The issue arises whether the Prosecution may examine the witness upon the statement which he made concerning the witness's removal from Krajina and as to where the order came from. The first point I make is that it does not seem to the Trial Chamber that the cross-examination which secured a contradictory answer, or what may be thought to be a contradictory answer, was outside the scope of the original examination. It was to the point. But the issue which arises is whether the Prosecution should be entitled to put the statement to the witness to point out a contradiction, or a possible contradiction. The common law prevents the—prevents such an examination and does so on the ground that a party cannot cross-examine its own witness and, as Mr. Kay [the *Amicus Curiae*] points out, the party calling the witness must take the witness as it finds it and is bound by the evidence. There is an exception, as Mr. Groome [the prosecutor] has pointed out, in the case of a hostile witness, a particular procedure which involves a finding by the Court that the witness is hostile and then the party may cross-examine the witness upon his statement in order to contradict him. But we are not bound by the rules of the common law, and it does not seem appropriate to go down that particular path or try and follow that particular procedure, and indeed, Mr. Groome, in the end, has not sought to do so, and we do not think it would be right. However, we note, first of all, that the statement has been exhibited.... We therefore think it right to allow the Prosecution to ask questions limited to clarifying the witness's evidence upon the point and clarifying the statement. That, we believe, would be important in the Tribunal's duty to determine the truth and to find the truth and in its overall procedures. We shall, therefore, allow the examination but limited to clarification, as we've said.

*Milošević case* (133), Trial Tr. 16732:1-25, 16733:1-6 (21 Feb. 2003).

\* *See, e.g.,* Bieber, Trix, Armatta; *cf.* Anoya.



† Waters takes a different view of the *Amici's* incentives and primary role, at 302-303.

‡ Anoya discusses this shift at 160-161, 169-171.

\* *See Milošević case (72)*, Reasons for Decision on Assignment of Defence Counsel (22 Sept. 2004) (setting out the reasons for the oral ruling of 2 September 2004); *Milošević case (50)*, Order on Modalities (3 Sept. 2004).

† Once for example, Milošević began his cross-examination by apologizing to the witness: “I am sorry that the witness lost a baby, but I have to ask her a few questions.” *Milošević case* (100), Trial Tr. 1091:4-5 (26 Feb. 2002).

‡ One of his earliest cross-examinations was particularly disconcerting—that of Mahmut Bakalli, a Kosovar Albanian and the province’s Communist leader in the late SFRY. At one point, discussing the Jashari family, Milošević asked, “Do you know that the police surrounded the house to arrest them, and that they did not want to surrender themselves to the police and that they shot at the policemen? Do you know that during those two hours it was the women and children that came out of the house mostly?” Bakalli answered, “I don’t know. But I do know that women and children were murdered in the house and around the house.” Milošević answered: “The ones that came out of the house certainly weren’t killed[.]” *Milošević case* (97), Trial Tr. 571:9-12, 572:2-4 (19 Feb. 2002). Milošević was trying to paint the Albanians as terrorists, and most likely the witness had been involved in some kind of antigovernmental activity and wanted to avoid any admission of it. *See also* Trix, Surroi, and Krasniqi on testimony in the *Kosovo* phase and Milošević’s handling of the witnesses.



\* Milošević enjoyed a special regime of detention facilities and visits under an order providing that “the Accused must be provided with facilities in a privileged setting to confer with witnesses and others and work with documents and material relevant to his defence, logistical support with regard to witnesses and facilities to prepare for the presentation of his case.” *Milošević case* (44), Order Concerning Preparation and Presentation of Defence Case (17 Sept. 2003).

\* Dr. Kelly Dawn Askin is senior legal officer for International Justice in the Open Society Justice Initiative. She served as a legal advisor to the judges of the ICTY and ICTR from 2000 to 2002.

† Del Ponte served over eight years, from August 1999 to January 2008; Richard Goldstone served just over two years, and Louise Arbour served three years; Del Ponte's successor, Serge Brammertz, has been in office since January 2008.

\* In this respect, the development of plea bargaining at the ICTY—which was not initially contemplated—constituted a welcome move toward ensuring the Prosecution had realistic and efficacious tools at its disposal.

\* For example, for over a decade (1995–2006), the Coalition for International Justice was involved in a range of projects in Washington, Belgrade, and The Hague devoted to ensuring senior leaders were brought to justice before the ICTY. See Coalition for International Justice, *Coalition for International Justice (CIJ) Trial Reports Archive*, 1995–2006, <http://iwpr.net/programme/international-justice-icty/coalition-international-justice-cij-trial-reports-archive>.



† Indeed, given that the ICTY was the first international criminal tribunal since Nuremberg, judges with more experience were actually rare.

\* Anoya at 163-164.

† Some of the common law practices are attributable to the fact that the vast majority of senior trial attorneys in the Prosecution are from the United States, skilled in the adversarial system of cross-examining witnesses.

‡ *Pros. v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, Judgement (26 July 2010). Although the judges of the ICTY have amended the RPE since *Milošević* in order to address these problems, the *Karadžić* trial shows they have made little progress in shortening some of the trials: *Karadžić*, which after fits and starts finally began hearing testimony in April 2010, is expected to last at least until April 2014. See *Pros. v. Karadžić*, IT-95-5/18-I, Status Conference, Trial Tr. 6109 (3 Sept. 2010), <http://www.icty.org/x/cases/karadzic/trans/en/100903SE.htm>.

§ The Registry has responsibility for assignment of defense counsel, including *Amici Curiae*, detention issues (including handling of medication), the Victim and Witnesses Unit, courtroom management and technology, including translation, and other matters. These factors impact the speed of trial. *See* Anoya for a discussion of some of these issues.



\* Boas, who worked in Chambers, discusses this at length, as does Mégret.

† See Krasniqi at 217, Surroi at 226-227, Bachmann at 266, and Trix at 239-240, 242, 245-246 for Kosovo; and Swimelar at 189 for Bosnia.

‡ *See* Anoya at 169-173.

\* On Milošević's skills in the courtroom, and their impact on victims, *see also* Surroi, Krasniqi, and Trix.

\* However, there is still much to be done in the area of self-representation, as is particularly evident in the *Šešelj* trial, which finally began in November 2007. *Pros. v. Šešelj*, IT-03-67, Trial Tr. 1784 (7 Nov. 2007). *See also* discussion in WALD, TYRANTS ON TRIAL.



\* The Trial Chamber's mid-trial acquittal of Karadžić on the genocide count for the early part of the Bosnian war, though later reinstated by the Appeals Chamber, suggests both that the ICTY has settled on a narrow reading of genocide in Bosnia—limited to Srebrenica—and that the Prosecution continues to pursue overly ambitious cases on the *Milošević* model.

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\* Self-representation is also referred to as *pro se*, *propria persona* (“*proper*”), unrepresented litigant, or litigant in person. The wider debate surrounding the right of self-representation hinges on the divide between the inquisitorial and adversarial legal systems. Indeed, the question of whether to prohibit self-representation is more relevant in an adversarial system. In an inquisitorial system, the judge plays the investigative role, so the involvement of the accused in putting on his own case is minimized. In an adversarial system, such as the ICTY, imposing counsel on an accused who wishes to defend himself in essence prevents him from putting on his case as he sees fit. *See* OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 508 (Antonio Cassese ed., 2009).

† The *Milošević* Trial Chamber evidently thought that the Statute reflected a customary right to self-representation. See Cerruti, *Self-Representation in the International Arena: Removing a False Right of Spectacle*, 40 GEO. J. INT'L L. 919 (2009) (arguing that the ICTY wrongly relied on *Faretta v. California*, 422 U.S. 806 (1975), in that a defendant's autonomy and right to be self-represented was guaranteed by the U.S. Constitution); *Pros. v. Milošević* (16), Initial Appearance (3 July 2001) (Judge Robinson states, "I do not consider it appropriate for the Chamber to impose counsel upon the accused. We have to act in accordance with the Statute and our Rules which, in any event, reflect the position under customary international law, which is that the accused has a right to counsel, but he also has a right not to have counsel. He has a right to defend himself, and it is quite clear that he has chosen to defend himself. He has made that abundantly clear. The strategy that the Chamber has employed of appointing an amicus curiae will take care of the problems that you have outlined, but I stress that it would be wrong for the Chamber to impose counsel on the accused, because that would be in breach of the position under customary international law.").

\* A plain reading of the ICTY Statute entitles the accused the right “to defend himself in person.” Stat. ICTY, Art. 21(4)(d). *See* next section.



\* Milošević was a trained lawyer, but did not have courtroom experience in criminal or international law.

\* These were Momčilo Krajišnik (on appeal), Zdravko Tolimir, and Radovan Karadžić; Vojislav Šešelj accepted the services of the Pro Se Office only in May 2010.

\* This was also true of outside observers. An acquaintance of mine from New York City attended one of the hearings with a group of students who were observing the ICTY proceedings. I was glad to spot him through the bulletproof glass that divides the courtroom from the public gallery. After the hearing, I stepped out to greet him. All he had to say to me was, “I couldn’t do it, I don’t know how you can manage to work with that man.”

\* I supervised the office until June 2009.

\* Milošević's Legal Associates were funded through private means.



† In the *Šešelj* case, the Accused did not cooperate in disclosing the necessary records to establish indigency. As such, the Registry denied his request for Tribunal funding for his defense team. *See Pros. v. Šešelj* (9), Deputy Registrar's Public Redacted Decision (6 July 2010).

‡ The standards established by Judge May required Milošević's legal advisers to submit their curriculum vitae and sign an undertaking, which was filed on the record. The legal adviser was then appointed or accepted by the Chamber. This was a temporary deviation from the normal practice set out in the Directive on Assignment of Counsel, which required the Registrar to issue a decision on the assignment of counsel to an accused. In later self-represented accused cases, the Registrar assigned Legal Advisers. CODE OF PROF'L CONDUCT FOR DEFENCE COUNSEL APPEARING BEFORE THE INT'L TRIB., IT/125. *See also Pros. v. Karadžić* (6), Registry Submission regarding Accused's Representation ¶ 40 (6 Aug. 2008).

\* In July 2009, Šešelj was found guilty of contempt for publishing the names and other details of protected witnesses in a book and was sentenced to 15 months of imprisonment. The Appeals Chamber upheld the decision. *Pros. v. Šešelj* (6), Appeals Chamber Judgement (9 May 2010). Šešelj was convicted on a second contempt charge in October 2011, and of a third set of charges of contempt in June 2012, both concerning publication of confidential materials in books on his Web site. *See Pros. v. Šešelj* (11), Public Redacted Version of “Judgement” (31 Oct. 2011); *Pros. v. Šešelj* (12), Public Redacted Version of Judgment Issued on 28 June 2012 (28 June 2012).

† The *Krajišnik* Appeals Chamber decision saw no error in the Registry's determination that *Krajišnik* was permitted to discuss confidential matters only with Legal Associates who were permitted to visit him at the UNDU unmonitored. The Registry's rationale was that they were the only persons bound to the Code of Conduct. Although the Chamber recognized the difficulty for a detained accused who is required to conduct his defense from his cell—which necessitated discussing confidential matters with other members of the defense team by means other than face-to-face—it recognized the Registry's efforts to strike a balance, as the Legal Associates were legal professionals who could ensure the appropriate use of confidential information. *See Pros. v. Krajišnik* (1), Decision on *Krajišnik* Request (11 Sept. 2007).

\* *See* Askin at 152-154 and Del Ponte at 140-142 on the role of the judges.



† The Special Tribunal for Lebanon, formed in March 2009, established a Defense Office, and should this hybrid court be faced with the challenges of a self-represented accused, the *Pro Se* Office's role and responsibility will be more appropriately placed with the Defense Office. *See* Special Trib. Leb., R. P. & EVID. 57(E) (as amended 30 Oct. 2009) STL/BD/2009/01/Rev.2.

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\* Waters describes some of these aims, especially in relation to political reconciliation, at 297-299.

\* The costs of the ICTY and ICTR, and the length of their trials, have been some of the principal criticisms raised against them. Delays and expenses cannot be solely or even primarily attributed to cases involving self-representation, of course, though arguably such trials do take even more time than other trials. *See, e.g.,* Wippman, *Costs of International Justice*, 100 AM. J. INT'L L. 861, 862 (2006).

\* *See* Del Ponte 139-142, 145-148 for a critical view of these issues.



\* Waters discusses this point, at 302-303.

\* Safia Swimelar is an associate professor of political science and international studies at Elon University. In 2006–2007, she was a Fulbright Scholar at the University of Sarajevo.

\* This phrase, which became the clichéd rhetorical device used in the media and by supporters of the *Milošević* trial, generally appears in quotes. *See, e.g.,* ARMATTA, TWILIGHT OF IMPUNITY, at ix; BOAS, MILOŠEVIĆ TRIAL, at xxi. *See also* Bachmann.

† Reconciliation is understood to be the ability of victims and perpetrators more specifically, or members of different ethno-national groups more generally, to live together peacefully following conflict. A related term used here is inter-ethnic accommodation. On reconciliation, *see generally* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES (Joanna R. Quinn ed., 2009) (examining differing views and definitions of reconciliation and its role in society).

‡ Space prevents me from examining further effects of the trial such as potentially supporting the process of democratization in Bosnia through the activation of civil society, reinforcing local prosecutorial capacity, and reinforcing skepticism toward the current *Mladić* and *Karadžić* trials.



§ This chapter canvases a range of Bosniaks' attitudes through scholarly literature, Bosnian media (daily papers, weekly magazines), editorials, and personal interviews and communications with a broad cross-section of individuals in Bosnia—professors, journalists, lawyers, victims, war veterans, nongovernmental representatives, and international community members. All of the respondents consulted in this research have been consistent observers or participants in Bosnian social and political life and would be aware of trends and changes in Bosnia since the end of the war. *See* KOLIND, POST-WAR IDENTIFICATION: EVERYDAY MUSLIM COUNTERDISCOURSE IN BOSNIA (analyzing the complexity and variability of Bosniak identity and how it has been affected by the war).

¶ Regardless of the methods adopted, we should be wary of setting too high a standard for measuring and critiquing international trials, expecting international law to achieve more than it possibly could; nor should we ignore the extralegal outcomes and benefits legal institutions can generate. The criteria by which we measure the success, failure, effects, or implications of an international tribunal should consider the context—here, postwar Bosnia—not only the formal goals of the institution or its founders. In this vein, for example, several other chapters discuss the reconciliatory effects of the Tribunal, even though this is not a formal purpose listed in Resolution 827.

\* Problematic as the term “international community” may be, it is the most useful way to describe the outside states and international organizations involved in Bosnia; it is also the term commonly used by Bosniak respondents to describe them. Sometimes interlocutors would use the term to refer broadly to the states and interests behind the ICTY, but not the ICTY itself.

† Other authors—including Nielsen—make a similar point that the effects of individual trials cannot be productively measured in isolation.

‡ Approximately one hundred thousand people were killed in the war, with approximately 83,000 or 83 percent of them Bosniaks. CIA estimates from March 1995 suggested that 90 percent of all war crimes were committed by Bosnian Serb and Serbian forces. NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA* 223; *see also* CIGAR, *GENOCIDE IN BOSNIA*; Nettelfield, “Research and Repercussions of Death Tolls: The Case of the Bosnian Book of the Dead,” *in* *SEX, DRUGS, AND BODY COUNTS* (Andreas & Greenhill eds.) (discussing the politics and debates surrounding the numbers of war casualties in Bosnia).



\* Bassiouni advances this argument.

† The survey noted here was carried out in three cities in the Federation and two in the RS; 66 percent of respondents were from the RS, and Bosniaks represented 45 percent of the respondents. NETTELFIELD, COURTING DEMOCRACY [ch. 7](#).

\* Scholars and the ICTY itself have identified several formal goals or outcomes of international prosecutions: (1) to punish perpetrators (retributive justice); (2) to reveal the truth about past crimes; (3) to provide a sense of justice to the victims; (4) to promote reconciliation (restorative justice); (5) to promote the rule of law in new democracies; and (6) to serve as a specific and general deterrent of future crimes. The assumption that international courts can have a positive effect on reconciliation and local justice has not necessarily been matched by empirical evidence. See *Achievements*, ICTY, <http://www.icty.org/sid/324>; Snyder & Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 5, 20, 43 (2003); MY NEIGHBOR, MY ENEMY (Stover & Weinstein eds.) (supporting a more holistic approach to justice beyond criminal trials); Meernik, *Justice and Peace?* 7 (finding that the ICTY had only either limited or negative impacts on "societal peace" in Bosnia in all but one case). But see Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (arguing that criminal tribunals have contributed to peacebuilding in postwar societies and made it more likely that leaders will cooperate with other ethnic groups); NETTELFIELD, *COURTING DEMOCRACY* 10 (showing that the ICTY has contributed to democratization, the rule of law, and new postwar political identities).

\* Compare the arguments by Hartmann, Várady, and Shany.

\* *See* Bieber, Dragović-Soso, and Pešić concerning Serb attitudes, whereas Lamont similarly find attitudes of disappointment coupled with the durable power of narratives in Croatia.



† *But see* Waters arguing why this is logically and doctrinally insupportable.

\* See Waters at 297-299 (discussing this theory and its critics).

\* One empirical study on the impact of the ICTY (specifically pleas and sentencing) on refugee return (as a precursor to reconciliation) found only minimal significant relationships between the two, with the exceptions of defendants pleading guilty and the relative size of the Serb population, which were positively correlated with returns. *See* Monika Nalepa, “Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina,” *in* NOMOS: PROCEEDINGS OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY, vol.50 (Williams & Elster eds.).

\* Compare Waters making a similar argument about the limited utility of terminated trials.

\* As an illustration of many Bosnian Serbs' attitude, journalist Eldin Hadžović cited the statue recently unveiled in Banja Luka of former Serb general Momir Talić, who was indicted for genocide and crimes against humanity in 1999 but died of cancer in 2003 before his trial finished. Telephone Interview with Eldin Hadžović, *BH Dani* (13 Aug. 2010).



† Headline in FERAL TRIBUNE (Zagreb), cited by Bazdulj, *Treba li spaliti Carlu del Ponte? [Do we need to burn Carla Del Ponte?]*, BH DANI, 20 Apr. 2007. Showing a clear recognition of the connections between the individual focus of *Milošević* and the collective implications of *Bosnian Genocide*, the headline plays on the fact that the ICJ verdict was delivered a day after the American Academy Awards; the cover of the Croatian weekly *Feral Tribune*, with this headline, showed Milošević holding an Oscar in his hand.

‡ See the discussion in Hartmann, Várady, Shany, and Waters; Prelec discusses the VSO documents that were at issue in the controversy over *Bosnian Genocide*.

§ Topić agreed that the ICJ case was more important for Bosniaks and that if Milošević had been convicted, but Bosnia had still lost at the ICJ, Bosniaks would have been very dissatisfied and felt a strong sense of injustice. Personal Communication with Tanja Topić, Friedrich Ebert Foundation, Banja Luka (26 Aug. 2010).

\* *See* discussion in Hartmann, Prelec, and Várady.

\* That is, the idea of neighborliness. Tone Bringa's study of inter-ethnic relations in a Bosniak and Croat village and relations between neighbors both before and during the war found that individuals considered hospitality and related social exchange—such as women's coffee visits and men's work parties—the basis for neighborliness. *See* BRINGA, BEING MUSLIM THE BOSNIAN WAY.



\* However, the disappointment and anger among many Serbs at the ICTY's recent acquittal of former Croatian generals Ante Gotovina and Mladen Markač illustrates that belief in the Tribunal's political bias still runs strong; whether a trial is terminated or not, it can fail to deliver justice to many victims. *See* Waterfield, *Croatian Hero Ante Gotovina Acquitted of War Crimes*, THE TELEGRAPH, 16 Nov. 2012, <http://www.telegraph.co.uk/news/worldnews/europe/croatia/9682855/Croatian-hero-Ante-Gotovina-acquitted-of-war-crimes.html>. I believe these two acquittals have worsened the negative perceptions of the ICTY among many citizens in the former Yugoslavia. *See* Lamont at 211.

† No respondent sounded positive about the future of the Bosnian state, nor did they mention Europeanization as a potential positive force for change—an observation confirmed from many months of fieldwork and interviews.

\* These new trials will offer further opportunities to test the effects of trials on and in Bosnia's political and social context. Some interlocutors believe they hold potential to do what may not have occurred in *Milošević*. Others, however already anticipate that Karadžić's trial and potential conviction will not have any positive effect: "Karadžić's politics will not be reversed. He may be convicted, but that is no consolation to me. I am [still] afraid to go to my house. Timing is everything [and now] it is way too late." Telephone Interview with Bosnian-American psychologist (21 July 2010).

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\* *See, e.g.*, PROSECUTING HEADS OF STATE; NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 213. This type of argument is similar to the claims about authoritative narrative theory that Waters discusses, though the second type of argument is different from his second category.



† RECOM is formally known as the Regional Commission Tasked with Establishing the Facts about War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the Period from 1991–2001. For more on RECOM, see Kostovicova’s chapter.

‡ A methodological note: This chapter's examination of public debates will be restricted to an elite level, in particular political and media elites.

§ News of Milošević's transfer to the ICTY was broadly welcomed among Croatian political elites in 2001. For reactions from a broad range of Croatian political elites to Milošević's transfer, see *Reagiranja na izručenje bivšeg jugoslavenskog predsjednika sud za ratne zločine u Haagu*, SLOBODNA DALMACIJA, 29 June 2001, <http://arhiv.slobodnadalmacija.hr/20010629/novosti4.htm>. Croatia's dominant narrative argues that the Homeland War, as the 1991–95 period is known there, constituted an international armed conflict waged on Croatian territory by Belgrade, a view that—tensions between Croatia and the ICTY notwithstanding—is largely consonant with the Prosecution's theory in *Milošević's Croatia* phase. See Hartmann, Waters, and Williamson for brief discussions of this alignment. For more on the Croatian government's reliance on ICTY judgments to support its own view of the war in Croatia, see, for example, *Presudom Martiću potvrđena umiješanost JNA i Srbije*, JUTARNJI LIST, 12 June 2007, <http://www.jutarnji.hr/presudom-marticu-potvrdena-umijesanost-jna-i-srbije/178119/>.

\* *See* Nielsen and Prelec.

† The *Croatia* indictment alleged that the JCE over which Milošević presided came into existence during August 1991.



‡ In broad terms, nationalist challenges to ICTY indictments against Croats have for the most part employed just war rhetoric, rather than directly contesting allegations of individual responsibility for particular crimes. In its most extreme form, proponents of this line of thought argued that it was not possible for war crimes to be committed by individuals waging a defensive war. For example, Mile Bogović, historian and bishop of Gospić-Senj, argued “A war crime is committed by the side that started the war in the event that it commits a crime.” Bogović, “Is the Hague Tribunal Interested in the Complete and Objective Picture of the Events of the Past War?,” *in* CROATIAN GENERALS ARE NOT GUILTY 51 (Hitrec ed.).

\* *Jus ad bellum* refers to rules governing the resort to force, whereas *jus in bello* consists of rules governing conduct during hostilities. In the Croatian context, *jus ad bellum* rhetoric is often employed to emphasize the defensive and liberatory character of the Homeland War as set out in the 2000 parliamentary Declaration on the Homeland War and the Croatian Constitutional Court's 2002 report examining the legality of the Croatian Army's conduct during the Homeland War. Croatian Parliament, *Deklaraciju o domovinskom ratu*; Croatian Constitutional Court, *Izvešće u povodu inicijative Vlade Republike Hrvatske*, OFFICIAL GAZETTE 133/2002, 15 Nov. 2002.

† Zoran Pusić, President of the Citizens Committee for Human Rights, pointed out that cooperation with the ICTY has always proven difficult for the HDZ, which eventually accepted the necessity to comply with Tribunal orders as a result of EU conditionality but remained hostile to ICTY efforts to prosecute Croats. Interview with Zoran Pusić in Zagreb, 8 Sept. 2010.

‡ In April 2010 Josipović expressed deep regret for Croatia's conduct during the war in Bosnia. In response, Kosor defended Tuđman's attempt to secure territory in Bosnia. See Marijan Lipovac, *Hrvatska politika u devedesetima nije bila agresorska*, VJESNIK, 16 Apr. 2010, at 2. See also Jović & Lamont, *Introduction: Croatia after Tuđman: Encounters with the Consequences of Conflict and Authoritarianism*, 62 EUROPE-ASIA STUD. 1610 (2010).

§ This number excludes Bosnian Croats indicted for crimes committed in the territory of Bosnia.



¶ This position was most clearly articulated by Croatian General Janko Bobetko who argued that the victorious parties in armed conflict have never had to answer for their actions in court. Quoted in PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 132. It also can be found in CROATIAN GENERALS ARE NOT GUILTY 7, 16.

\* The cover illustration of the 7 July 2001 issue of the Split-based *Feral Tribune* showed Tuđman and Milošević together, with Tuđman commenting that the grave was preferable to being a slave—a view “epitomizing Croatia’s relationship” with the ICTY. Pavlaković, “Better the Grave than a Slave: Croatia and the International Criminal Tribunal for the Former Yugoslavia,” in *CROATIA SINCE INDEPENDENCE: WAR, POLITICS, SOCIETY, FOREIGN RELATIONS* 447 (Ramet, Clewing & Lukić eds.).

† *See also* Boas and van der Wilt.

‡ Boas discusses the joinder of Milošević's three indictments; Hartmann discusses the dynamics of indictment of other members of the JCE, though with particular focus on Bosnia.

§ Other relevant cases included *Martić*, *Babić*, and *Stanišić & Simatović*.



\* The ICTY did indict four senior JNA officers—Pavle Strugar, Miodrag Jokić, Milan Zec, and Vladimir Kovačević—for the shelling of Dubrovnik in 1991. *Pros. v. Strugar et al.*, Indictment (22 Feb. 2001). Although charges against Zec were withdrawn later in 2001 and Kovačević's case was referred back to the Serbian judiciary under Rule 11*bis*, Jokić pled guilty to all charges and was sentenced to seven years imprisonment. Strugar was sentenced to seven and a half years imprisonment by the Appeals Chamber in 2008. *Pros. v. Strugar* (1), Appeals Judgment (17 July 2008).

† Following Bosnia's genocide suit before the International Court of Justice against the FRY, Croatia too filed suit against the FRY in 1999, alleging that Belgrade had committed genocide on Croatian territory. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) 1999 I.C.J. 118, (2 July 1999), <http://www.icj-cij.org/docket/files/118/7125.pdf> [Croatia v. Yugoslavia, Genocide Application]. For a discussion of Bosnia's genocide case, see Shany's and Várady's chapters.

\* Waters argues this point, whereas Nielsen shows the considerable value the evidence retains despite the lack of a judgment.

† The OSCE reported that a lack of understanding among political and media elites on the distinction between the ICJ and ICTY further added to the “volatility of reaction in Croatia to international war crimes proceedings.” OSCE, *News in Brief: April 4–April 17, 2007*, OSCE MISSION TO CROATIA, 17 Apr. 2007, <http://www.osce.org/zagreb/24936>. See also Government of the Republic of Croatia, *Predsjednik Mesić i premijer Sanader: Slučaj Del Ponte-Srbija pred nadležna međunarodna tijela*, NEWS AND ANNOUNCEMENTS, 16 Apr. 2007, [http://www.vlada.hr/hr/naslovnica/novosti\\_i\\_najave/2007/travanj/predsjednik\\_mesic\\_i\\_premijer\\_sanader\\_slucaj\\_del\\_ponte\\_srbija\\_pred\\_nadlezna\\_medunarodna\\_tijela/\(back\)/temu](http://www.vlada.hr/hr/naslovnica/novosti_i_najave/2007/travanj/predsjednik_mesic_i_premijer_sanader_slucaj_del_ponte_srbija_pred_nadlezna_medunarodna_tijela/(back)/temu).

\* In May 2009, Šljivančanin's sentence had been increased to 17 years when the Appeals Chamber found Šljivančanin guilty of aiding and abetting the murder of prisoners at Ovčara. *Pros. v. Mrkšić & Šljivančanin*, Appeals Judgment (5 May 2009). Thus, his final sentence of 10 years represented a reduction.



† Šljivančanin's 10-year sentence provoked significant anger from victims. Vesna Bosanac, the director of the Vukovar hospital from which the victims of the Ovčara farm massacre were seized stated "The Hague died," following Šljivančanin's sentence. Branimir Bradarić, *Bosanac: Sramotna presuda! Za Ovčaru je nagrađen, Haag je umro*, VEČERNJI LIST, 8 Dec. 2010, <http://www.vecernji.hr/vijesti/bosanac-sramotna-presuda-za-ovcaru-je-nagrađen-haag-je-umro-clanak-226067>.

\* The verdict was broadcast by Croatia's state television channel HTV and the national networks Nova and RTL.

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\* “Cultural politics” refers to the intersections between the culture and politics. It does not correspond to “a narrow definition of either the realm of culture as referring to artistic production or of politics as referring to the formal electoral process. Instead,... [it] refers to the complex process by which the whole domain in which people search and create meaning about their everyday lives is subject to politicization and struggle. The central issue of such a cultural politics is the exercise of power in both institutional and ideological forms and the manner in which ‘cultural practices’ relate to this context[.]” Angus & Jhally, “Introduction,” *in* CULTURAL POLITICS IN CONTEMPORARY AMERICA 2 (Angus & Jhally eds.). The concept of the cultural politics also draws attention to the emotions not as private but as social constructions that play an important role in the shaping of publics. *See* AHMED, THE CULTURAL POLITICS OF EMOTIONS 1–19.

† As a matter of method, the chapter relies on newspaper articles as sources for the multiple discourses on the trial. In particular, it analyzes articles in *Koha Ditore*, which is the most influential newspaper in Kosovo and has the largest circulation, during the first two weeks of the trial, from 12 to 26 Feb. 2002. The chapter examines the representation of those voices that had been affected the most in the Kosovo war: individuals and families who have lost family members and relatives as the firsthand witnesses of the crimes of the Milošević regime.



\* In 1990, the Serbian authorities suppressed the Albanian-language service of the provincial broadcaster, *Radio Televizioni i Prishtinës* (Radio Television of Pristina or RTP), turning it into an adjunct of the Serbian state broadcasting network. Albanian staff were laid off and replaced by Serbs, and RTP was used to promote a Serbian nationalist agenda. No private or commercial broadcasting in the Albanian language was allowed in Kosovo. The situation of the print media was more complex. Although the official Albanian-language publisher was taken over, along with the printing press and distribution network, Albanian newspapers were not subjected to complete control; the most influential paper at the time was probably *Koha* weekly—the precursor to the daily paper analyzed in this chapter—but even a newspaper that specialized in agricultural affairs, *Bujku*, could become a refuge for independent journalism. Some Kosovar Albanian newspapers were printed in Western Europe and smuggled into Kosovo. It was even possible to launch private newspapers that were generally tolerated even when they criticized Serbian policy toward Kosovo. Nevertheless, journalists risked arrest, arbitrary sanctions, and beatings and, in some cases, murder. See Krasniqi, *Television across Europe: Regulation, Policy, and Independence*, OPEN SOCIETY INSTITUTE (OSI) 2009, at 21.

† Academic discussion on Kosovo generally focuses on three clusters: (1) the origins and conduct of the Kosovo war, (2) the political mechanics of international rule in postwar Kosovo, and (3) the status of Kosovo in international law. On the war, *see* MALCOLM, KOSOVO A SHORT HISTORY; MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR. On postwar international rule, *see* IGNATIEFF, EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO AND AFGHANISTAN; Tansey, *Kosovo: Independence and Tutelage*, 20 J. DEMOCRACY 152–66 (2009). On the status of Kosovo in international law, *see* Bothe & Marauhn, “U.N. Administration of Kosovo and East Timor: Concept, Legality, and Limitation of Security Council-Mandated Trustee Administration,” *in* KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 217–42 (Tomuschat ed.); Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administrations*, 95 AM. J. INT’L L. 583 (2001).

‡ Sites associated with Islam were targeted for destruction.

Approximately two hundred of more than six hundred mosques in Kosovo were damaged or destroyed during 1998–1999, along with Sufi lodges and Islamic schools, archives, and libraries. *See* Hercher & Riedlmayer, “The Destruction of Cultural Heritage in Kosovo, 1998–1999: A Post-War Survey” (Kosovo Cultural Heritage Project, 2001), [http://hague.bard.edu/reports/hr\\_riedlmayer-28feb2002.pdf](http://hague.bard.edu/reports/hr_riedlmayer-28feb2002.pdf).

\* The major headlines of the newspaper *Koha Ditore* on the day of the trial were the following: “The catch of the biggest fish, Milošević[;]” “In the wake of the trial of the ‘butcher of the Balkans’ victims demand more justice[;]” “It is the trial of the century, the political parties state[;]” “The sobbing of graves on the first day of the trial[;]” “For the delayed justice[.]” All translations are mine.

\* On 28 June 1989, Milošević addressed a crowd of one million Serbs at Gazimestan, at celebrations marking the 600th anniversary of the Battle of Kosovo. To Kosovar Albanians, this marked the opening salvo in Milošević's destructive campaign, grounded in myths about the Serbian nation.



<sup>†</sup> *See also* Trix at 236, 240, 245-246.

\* Bieber at 422-424.

† *See* Bieber at 433-435.

‡ Bieber at 425.

\* It took 12 years for Serbia to convict the first paramilitary soldiers for crimes in connection with the Srebrenica massacre in Bosnia.



<sup>†</sup> See Trix at 244*ff.*

‡ Mary Kaldor uses Bosnia as a key example of the “new war”: Such wars have multiple actors (paramilitaries, mercenaries, and mafia) but with blurred lines of engagement, and they deal with identity politics. The mode of warfare is dispersed, anti-civilian, with atrocities and the use of light weapons. The war economy is open and decentralized, with the black economy as its major feature. Finally, the paradigm of “new war” involves external support from diaspora, mafia, and mercenaries, as well as regional powers. KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA.

\* Veton Surroi is publisher of the KOHA Media Group. He founded KOHA Ditore, the largest independent newspaper in Kosovo, as well as the independent national television station KTV. He was one of the signatories of the Rambouillet Accords. As head of the ORA party and Member of Parliament, from October 2005 to December 2007 Surroi was a member of the Unity Team that negotiated the independence of Kosovo.

† *See also* Krasniqi, Trix, and Del Ponte (at 217, 235-237, and 147-148 respectively) on Bakalli's testimony.

\* A few examples:

MILOŠEVIĆ [INTERPRETATION] As the son of a Yugoslav diplomat, practically all your life you spent—you had a silver spoon in your mouth; isn't that right? [I answered "Yes, for a long period."]

MILOŠEVIĆ: Mr. Surroi, you are an intellectual. I think that there is no point in us listening to pathetic tirades as to how you have won your freedom. I asked you quite pragmatically.

MILOŠEVIĆ: As a journalist, you were well-known for your unobjective writing. Now, do you consider that during this testimony you are using half-truths?

MILOŠEVIĆ: All right. Thank you very much. At last I have got a concrete answer from you.

MILOŠEVIĆ: I suggest, if possible, that you answer my questions more briefly because time is flying.

*Milošević case* (104), Trial Tr. 3414:17-19 (18 Apr. 2002);

*Milošević case* (106), Trial Tr. 3425:23-25 (18 Apr. 2002);

*Milošević case* (107), Trial Tr. 3434:4-5 (18 Apr. 2002); *Milošević case* (108), Trial Tr. 3437:10-12 (18 Apr. 2002); *Milošević case* (109), Trial Tr. 3455:13-14 (18 Apr. 2002).



\* See Trix's chapter for further discussion of Kosovar Albanians' reactions.

† Bieber discusses the decline in Milošević's popular support, showing, implicitly, the heights it had once reached.

‡ There have been other trials relating to the *Milošević* JCE. I myself would testify again later in the *MOS* trial and in *Dorđević*. Hartmann's and Nielsen's chapters in particular discuss the uses of these trials to craft a legal or narrative reckoning about Milošević's role.

§ Anoya discusses the procedural responses to Milošević's decision to represent himself, and Del Ponte the strategic consequences of that decision.

\* See Bieber's chapter on this.



† I gave my testimony in Albanian, but understood the Serbian and English as well; at least once I was asked by the interpreters to pause before answering Milošević's questions. *Milošević case*, Trial Tr. 3420-1 (18 Apr. 2002).

† At our meeting in Belgrade, I had mentioned to Milošević the daily use of the derogatory term *Šiptar*. See *Pros. v. Milutinović et al.* (2), Trial Tr. 4540-2 (10 Oct. 2006).

† The only linguistic advantage Albanian witnesses had was that many of them spoke Serbian, and therefore could understand Milošević's questions directly, whereas Milošević could not understand their replies. *See* Trix's chapter for further discussion of the linguistic difficulties confronting Albanians who testified at or listened to the trial and the psychological impact of the Serbian language in the Kosovar context.

\* *See* Prelec for a discussion of how the Prosecution's presented Milošević's role, and Boas and Mégret for discussion of the decision to join the three indictments.

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\* These include KOHA DITORE and ZËRI, well-respected newspapers, but also other Kosovar Albanian newspapers that are closely affiliated with particular political parties, such as BOTA SOT with the LDK (formerly Rugova's Party), and EPOKA E RE with the PDK (Hashim Thaçi's Party). In addition, the chapter draws on the main Albanian newspaper in Tirana, KOHA JONË, as well as international news sources, the Institute for War and Peace Reporting, and *Balkan Insight*.

\* The *Lidhja Demokratike e Kosovës* (The Democratic League of Kosova, LDK)—Rugova’s party—won 47 percent of the vote, Hashim Thaçi’s *Partia Demokratike e Kosovës* (The Democratic Party of Kosova or PDK) won 24 percent, while Haradinaj’s party, *Aleanca për Ardhmërinë e Kosovës* (The Alliance for the Future of Kosova or AAK), won 6 percent. KING & MASON, PEACE AT ANY PRICE: HOW THE WORLD FAILED KOSOVO 124–25.

† In June 2002, after the trial began, then-senator Biden told Kosovar leader Nexhat Daci to act cautiously and not to anger the UN, as in the prevailing circumstances the United States was less apt to support Kosovars who were mostly Muslims. *Be Careful with UN.*

‡ The third Special Representative of the Secretary General, Michael Steiner, arrived in Kosovo during the opening of the *Milošević* trial. Kosovar Albanians' reactions to Steiner were initially positive, but they declined over the course of the following months when, for example, Steiner brokered a prisoner exchange with Serbia without any knowledge of the Pristina courts, in which Serbs who had been tried and sentenced for war crimes in Kosovo were exchanged for Kosovar Albanians held in Serbia. *Will Transferred Prisoners Be Treated as Criminals or Heroes?*, ZERI, 28 May 2002.

§ Serbia understood this distinction too, and that was one of the reasons it signed the Military Technical Agreement in June 1999, which called for the UN rather than NATO to administer Kosovo. WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE.



¶ There were initial indictments in January 2002, followed by later ones in July and August 2002.

**\*\* It appeared that even Kosovar Albanians who had agreed to testify at the Tribunal received little practical support—often they did not even know how they were to get there. They requested help from UNMIK, but UNMIK did not know how they were to get there either. This reflects hasty planning at best, and the Prosecution did not know which witnesses they would call until the month before the trial. HUM. RTS. WATCH, WEIGHING THE EVIDENCE 56.**

\* *See* Williamson at 77-80.

† World War II was experienced quite differently by Kosovar Albanians, for whom the Germans represented a relief from Serbian rule. Under German and Italian occupation, Albanians were finally allowed to attend school in their own language. Thus evoking the Nazis as the epitome of evil was not effective to those who remembered them in Kosovo. *See* MALCOLM, SHORT HISTORY OF KOSOVO 292–93.

\* MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR 8 (referring to this racism in the 1980s). It pervades the society and is clearest in the way Serbs refer to Albanians through the derogatory term, *Šiptar*, similar in meaning to “nigger.” See Trix, “Kosovar Albanians between a Rock and a Hard Place,” in *SERBIA SINCE 1989: POLITICS AND SOCIETY UNDER MILOŠEVIĆ AND AFTER* 309–49 (Ramet & Pavlaković eds.) (*see especially* 321–22 for use of this term by Serb judges referring to Albanian defendants in the courtroom). I have encountered it in my research in former Yugoslavia from the 1980s to the present day. See Surroi’s chapter on use of *Šiptar* as well, at 227.



\* Krasniqi also discusses this point, at 217.

† Musliu is the Belgrade correspondent of RTK, “Radio and Television Kosova,” a major source of news.

\* *See* Bieber.

† EPOKA E RE is affiliated with the PDK, at the time the main opposition party to Rugova's.

\* Agim Zeqiri, who had lost his wife and five children as well as 10 other relatives after 25 March 1999, and had been beaten so severely that he was now an invalid needing dialysis, refused to answer any more questions on the second day of cross-examination. *Milošević case* (98), Trial Tr. 783 (21 Feb. 2002).



\* Kosovars in Mitrovicë (Kosovska Mitrovica) expressed these views to me when I asked why some Kosovars had testified this way. *See, e.g.*, interview with Halit Berani, Mitrovicë (Mar. 2009). Surroi's chapter also discusses this phenomenon.

† *See* Bieber on this.

‡ Del Ponte's reply shows how far she was from Kosovar perspectives.  
“Yes, I am satisfied with how the trial is going. We cannot talk about how the accused is acting because this is not part of the indictment. Concerning the answers by Albanian and other eyewitnesses, I can say that I am very satisfied.” *No One in Kosovo Is Wanted by the ICTY*, BOTA SOT.

\* The pagination runs 114 pages, with 10 blank pages inserted to match the French translation.

† These are my calculations from a review of the transcript. A more accurate tabulation would require going through the four-hour video. But as the imbalance is already so great, and the areas that would grow in size would be those where interpretation to Albanian and back to English and Serbian would be required (i.e., cross-examination and reexamination), the tabulation from the official transcript is sufficient to make the point of imbalance.



\* I obtained Sadik Januzi's witness statements with assistance from Dr. Robert Elsie, Albanian interpreter for the ICTY through the entire *Milošević* trial.

† Geg and Tosk dialects are immediately distinguishable to a native speaker. Educated speakers of the dialects can understand each other, but uneducated speakers—or people speaking rural variants—can have extreme difficulty understanding each other.

‡ If there were immediate interpretation problems, there would always be the Geg original to refer to for emendation,] for it would have been videotaped.

\* *See “Rape and Sexual Assault,” in HUM. RTS. WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO*, where only 96 cases of rape were deemed credible, showing a remarkably low reporting rate for what women’s groups estimate at 20,000 rapes. Sevdije Ahmeti explained that due to considerations of family honor, generally only women with no close living male relative would consider reporting a rape.

\* *Cf.* Nielsen's chapter on the value of the written testimonies.



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\* Surroi also discusses the linguistic politics of the trial, at 226-227.

† Krasniqi at 215 notes Hannah Arendt's similar comments on how trials systematically focus on the perpetrator as agent and personality; cf. Meierhenrich at 317.

‡ There has not been any such gesture so far, although Serbian President Boris Tadić has apologized in Croatia and Bosnia for crimes committed there, and the Serbian National Assembly has approved a Declaration on Srebrenica. See *Skupština usvojila Deklaraciju o osudi zločina u Srebrenici*, Blic, 30 Mar. 2010, <http://www.blic.rs/Vesti/Politika/183008/Skupstina-usvojila-Deklaraciju-o-osudi-zlocina-u-Srebrenici>. Here is the substantive portion of Tadić's apology in Bosnia—in the original, given the ambiguity surrounding the meaning of “narod”: “Ja se izvinjavam svima protiv kojih ječinjen zločin u ime srpskog naroda, ali to niječinio srpski narod, nego su zločinci pojedinci i nemoguće je optuživati jedan narod.” *Tadić: Svi dugujemo izvinjenje*, B92, 6 Dec. 2004 [my translation: “I apologize to all against whom a crime was committed in the name of the Serbian people, but it was not committed by the Serbian people, since the criminals are individuals and it is impossible to accuse a people.”]. The text is ambiguous between the Serbian “people,” in the sense of the citizenry of Serbia, and “nation,” which would impliedly include Serbs who were citizens of Bosnia.

\* Of these, 461 are NGOs, associations and civic groups, and 1357 individuals. *See Coalition Members, Documents, INICIJATIVA ZA REKOM*, <http://www.zarekom.org/documents/Coalition-members.en.html?page=1>.



\* The RECOM project aims to be the first comprehensive record of crimes committed on the territory of former Yugoslavia, as no such records exist for the First and Second World Wars.

† Hoxha, *Vox Populi: What about Transitional Justice?*, 2 MADE IN KS... PAST, PRESENT, FUTURE 5, 6 (2010). There are still about 1,900 people missing, mostly Albanians but including about five hundred Serbs, Egyptians, Ashkali, and Roma. Furthermore, there has been a stagnation in recovering the remains of the missing both on the territory of Serbia since 2002, as well as from clandestine graves in Kosovo. Press Release, International Commission on Missing Persons, ICMP Issues Report on Missing Persons from the Kosovo Conflict (3 Mar. 2011), <http://www.icmp.org/press-releases/kosovo-stock-taking-report/>.

\* RECOM collected 100,566 signatures in Kosovo, which has a population of roughly two million. By contrast, there were 254,625 signatures in Serbia, with a population roughly four times the size; 122,540 in Bosnia, with over twice the population, and 19,674 in Croatia, which also has over twice the population. See *Në Kosovë 20 shtande për mbledhjen e nënshkrimeve*, INICIJATIVA ZA REKOM, 6 May 2011, <http://www.zarekom.org/lajme/N-Kosov-20-shtande-pr-mbledhjen-e-nnshkrimeve.sq.html>; Humanitarian Law Centre, *RECOM Development Process May 2006–August 2011: Report*, at 9–10, <http://zarekom.org/documents/RECOM-Development-Process-May-2006-August-2011>. Thanks to Nora Ahmetaj for this observation.

\* *See* Trix at 237-239.

\* An examination of Albanian and Serbian history textbooks on the subject of Kosovo's history, for example, reveals a mirror image template in accounting for the relationship with the ethnic other: Each group has a monopoly on suffering and martyrdom, denying the other's suffering, while the promotion of a historical sense of victim-hood is compounded by airbrushing one's own violence and repression. KOSTOVICOVA, KOSOVO: POLITICS OF IDENTITY AND SPACE 133–68.



† Lamont makes similar arguments concerning the cooptation of ICTY trials in Croatia.

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\* Many of the foreign correspondents accredited at the ICTY were also responsible for covering EU institutions in Brussels, Luxembourg, and Strasbourg, or even covered Western European or European issues from Paris, Berlin, and London.

\* This distinction should not be understood as making any categorical claim about the internationalist and liberal-democratic character of Western media or about nationalist tendencies in all Yugoslav media. It describes only general tendencies, which any given media outlet would share to varying degrees, and to which there were naturally exceptions. Within Serbia, for example, *Danas* and *B-92* are treated here as pro-ICL exceptions to the general anti-ICL tendency in Serbia. See chapters by Dragović-Soso and Pešić for more on media and intellectual trends in Serbia.

\* That is, it must be possible to embed them into an existing explanation or broader narrative, because only then can the writer (and reader) interpret them as good or bad and place them into a chronology or causal account. Journalists often facilitate this by including strong moral evaluations in their reporting and by attributing a specific significance to otherwise puzzling and incoherent facts, which makes these facts more accessible to the reader. In order to paint such a morally compelling and coherent picture, journalists have either to stress certain features of an event and marginalize others (which would tarnish the clarity of the frame) or to wholly cut out certain disturbing elements. Frames can define a problem and suggest a solution, but they need not; in many cases, frames simply embed an event into an existing moral story and chronology, and add a concise explanation about why the event happened and what its consequences are.



\* These four newspapers were selected because of their importance to public opinion and their large readership, and because their electronic archives facilitate simple statistical analysis. Some of the articles deal with the trial only in a cursory way, for example by referring to it in the context of the trial of Saddam Hussein, whereas others extensively analyze the details of the proceedings. Specialized news sources, such as SENSE and IWPR, and national news agencies, such as EFE, DPA, AP, and ANP, provided regular, often daily, coverage of the trial; Armatta discusses these in greater detail. This graph therefore does not mean to imply that all outlets responded in exactly this way; its aim is to show when the main lines of media interest shifted, and that this was largely independent of the geographic origin of the respective outlets.

\* See discussion in Trix's and Krasniqi's chapters.

\* In many cases, we can also assume the existence of an inherent, hidden conflict of interest between the two groups of journalists, which had an impact on the frames they used. Because the special envoys were closer to their central office and hence more influential at home, permanent correspondents needed to emphasize their special experience and insider knowledge in order to make a difference. This also worked the other way: Parachutists had to make a difference in order to justify why it had been necessary to send them to The Hague instead of using the coverage permanent correspondents (or specialized agency reports) would have delivered anyway. As they did not possess any specific expertise or insider knowledge, they only could differ from the correspondents in opinion.

\* For instance, a correspondent from a newspaper with an anti-ICL editorial frame might intend to write a vigorous attack against a prosecutor, but might anticipate trouble obtaining information from the Prosecution in the future.

\* See chapters by Prelec, Boas, van der Wilt, and Waters on these and related critiques of the Prosecution's strategy, and Anoya, Boas, and Trix on the Chamber's conduct toward Milošević as a defendant.



† The Hague is a relatively more expensive place for Yugoslav media to maintain a correspondent. In addition, there are bureaucratic obstacles: The ICTY is an international institution, but because it is in the Netherlands, journalists wishing to work at the ICTY had to apply for national residence permits instead of short-term Schengen tourist visas, and they had to provide either invitations from Dutch institutions or a contract with a Dutch employer. But the ICTY was not recognized as an employer or legitimate host by the Dutch immigration service, nor was the service satisfied with a journalist's contract with his editor, as the latter was not recognized as a Dutch employer. Verfuss, *Trying Poor Countries' Crimes in a Rich City: Problems of the Press in the Former Yugoslavia*, 2 J. INT'L CRIM. JUST. 509, 512 (2004). The result was less presence by Yugoslav media in The Hague. Here again we speak of tendencies, not absolutes: Certainly there was extensive coverage of the trial by journalists such as Mirko Klarin, who initially reported for IWPR and later for SENSE, as Armatta notes.

\* The Dutch immigration restrictions were quite indiscriminate. They were not targeted at media representing anti-ICL viewpoints; but the restrictions had differing effects on anti-ICL and pro-ICL media outlets from the former Yugoslavia.

† All Dutch governments traditionally have tried to support international justice and to base as many international judicial institutions in The Hague as possible by offering them financial and infrastructural support and creating a friendly environment. The Netherlands hosts the ICTY, the ICJ, the ICC, and several bilateral and multilateral arbitration courts.

‡ Nothing here means to suggest that proximity to the trial somehow automatically produced pro-ICL sentiments; the relative isolation in which anti-ICL media in particular operated was not the sole, or even primary source of their preferred frames. There were a number of permanent correspondents of anti-ICL media at the ICTY, for example from *Politika*; we speak only of tendencies and foregone opportunities for influence at the margins.

§ *Cf.* Trix's discussion of how Kosovar media reported—or did not report—the testimony of ordinary victims, at 239-242, as well as Kostovicova's discussion of victims' centrality to post-conflict justice, especially at 256-259.



¶ Klarin, *Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 89 J. INT'L CRIM. JUST. 89 (2009). Trix makes a similar point about Kosovar reporting, which tended to portray the trial as a nation-building exercise. *See also* Bieber's chapter on the portrayal of Milošević in Serbia.

\* During the *Milošević* trial, Del Ponte only once accepted an invitation for a working dinner from the Netherlands Foreign Press Association, whose members were covering the trial from The Hague.

\* Del Ponte's reorganization and streamlining of the ICTR Prosecution in 1999–2000 resulted in accusations of racism and discrimination, after which a desire to avoid leaks about internal conflicts may have become a major reason for restricting contacts between Prosecution members and the media. DEL PONTE & CHUCK SUDETIĆ, MADAME PROSECUTOR 132–38. Several members of the Prosecution later revealed information about such internal cleavages, especially Del Ponte's former deputy, Graham Blewitt. *See De politici laten Karadzic vrij lopen*, NRC HANDELSBLAD, 19 June 2004.

† Theoretically, the Prosecution could have leaked selected information to journalists, but with such low trust on both sides, the Prosecution could not be sure about the result, and journalists who might accept such a leak would not necessarily believe its content. The risk involved for both sides would have been much higher than in circumstances in which a measure of trust had been built and maintained.

‡ Part of the OTP's reluctance to disclose the names of witnesses and the time of their appearance was due to security considerations and witness protection. However, it served no clear purpose in cases in which the witness was a prominent figure—such as Paddy Ashdown, Wesley Clark, General Klaus Naumann, or Ibrahim Rugova, for example—whose entourage already had spread the news much earlier.



\* This is at least what Hartman claims in her book. HARTMANN, PAIX ET CHATIMENT 116–22. On the real or potential value of the VSO minutes, see also the chapters by Prelec, Hartmann, and Waters. Prelec in particular does not believe that the unredacted minutes confirm the Prosecution's preferred view of Milošević's role.

† Some information from the minutes was made public during the trial. Other parts—including information pertaining to the potentially critical redacted components—only became available later. This happened in part in September 2007 with the publication of Hartmann’s book, which contained information about the two court decisions for protective measures from 2005 and 2006, summarized the content of these orders, and disclosed some information about the minutes, which had been subject to these orders. In 2009 Hartmann was sentenced to a fine of 7,000 euros for contempt of court; the judgment was sustained on appeal in 2011. *Pros. v. Hartmann*, Judgment (Appeal) (19 July 2011).

‡ Nielson rightly argues that “the charge of genocide dominated the public and victim communities’ understanding of the trial, and through it, of the Tribunal as a whole.” Nielsen at 335. This actually devalued all convictions on charges other than genocide, by suggesting that anything less than a conviction for genocide would be a failure of the Prosecution and the ICTY. Nielson’s interpretation also demonstrates to what extreme extent both strands of journalism—pro- and anti-ICL—ignored the presumption of innocence, as a conviction of genocide, rather than being simply a verdict, came to be regarded as a proof of the ICTY’s performance, either its success (as the pro-ICL media would have seen it) or its bias and instrumentalization by “the new world order.” *See* LAUGHLAND, *TRAVESTY: TRIAL OF SLOBODAN MILOŠEVIĆ AND THE CORRUPTION OF INTERNATIONAL JUSTICE* 33–52.

\* Some judges nevertheless held confidential briefings for selected journalists, although the contents of those discussions never leaked out.

<sup>†</sup> See Armatta's discussion of the relevant standards, at 282-284.



‡ Due to the frictions within the Committee and the numerous conflicts between its members, it is difficult to define who actually belonged to the Committee at what times, and what its formal status was. There also was (and still is) the International Action Center in New York, founded by Ramsey Clark, who supported Milošević, sometimes together with the ICDSM, sometimes on its own. *See* INTERNATIONAL ACTION CENTER, <http://www.iacenter.org/>.

\* There were, of course, notable exceptions, such as the German radical left-wing monthly *Konkret* and daily *Junge Welt* and, and in some cases, *The Guardian*. Journalists' reluctance to report about the Committee's press conferences was mainly due to the inconsistent messages and obscure structure of the Committee, including uncertainty about the degree to which it actually acted in coordination with Milošević. Media outlets that tended to include arguments of Milošević defenders in their coverage often preferred to approach prominent trial critics, such as Ramsey Clark, directly. For an overview over the diverse landscape of Milošević defenders, see SCHÜTZ, DIE NATO INTERVENTION IN JUGOSLAWIEN: HINTERGRÜNDE, NEBENWIRKUNGEN UND FOLGEN 140–49 (criticizing the trial from an alterglobalist, anti-imperialist, but also Serbian nationalist position, and deploring the marginal influence of Milošević's defenders on mainstream media coverage).

\* The longer the trial lasted, the more the presumption of innocence waned in HRW reports. At the beginning, the reports and statements avoided any reference to Milošević's guilt or innocence, addressing him as "the accused" and as "being indicted," and discussing criteria for a fair trial. By the time Milošević died, Dicker was quoted in a press statement saying, "His trial laid bare the massive evidence of his crimes, but his victims will now be denied a formal judgment on his guilt." HUM. RTS. WATCH, MILOSEVIC ESCAPES JUDGMENT, NOT JUSTICE PROCESS (10 Mar. 2006), <http://www.hrw.org/en/news/2006/03/10/Milošević-escapes-judgment-not-justice-process>. See Waters at 307-313 concerning postmortem characterizations of Milošević's legal responsibility, including analysis of HRW's report WEIGHING THE EVIDENCE, at 313-314.

† Armatta, whose chapter follows this one, worked for CIJ.

\* *Milošević* was hardly the only lengthy trial; several other cases have taken years from initial appearance to verdict. Vojislav Šešelj surrendered to the Tribunal in 2003; his trial began in 2007 and is still ongoing. *Pros. v. Šešelj* (1)–(9). JCE had been an issue of controversy in several trials, including *Krstić*. *Pros. v. Krstić* (1)–(2). See also Prelec's, van der Wilt's, and Meierhenrich's chapters. Boas' discussion of the joinder process in *Milošević* identifies flaws that are general to the Tribunal's practice. There had also been earlier critiques of the Prosecution's indictment policies. In December 1997, the Prosecution had to withdraw indictments against several Bosnian Croats, charged with numerous crimes against Bosnian Muslims in the Lašva Valley, for lack of evidence. *Tribunal Frees Three Bosnian Croats*, *Tribunal Update 57: Last Week in The Hague* (Dec. 15–20, 1997), IWPR (10 Nov. 2005), <http://iwpr.net/report-news/tribunal-frees-three-bosnian-croats>; Press Release, ICTY (19 Dec. 1997), <http://www.icty.org/sid/7425>.



\* Boas provides an insightful analysis of this challenge from the perspective of the Trial Chamber. BOAS, THE MILOŠEVIĆ TRIAL 108–30. The scope of the charges also implicates issues of joinder, which Boas discusses in his chapter.

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\* Several other chapters describe developing disappointment during the trial in areas of the former Yugoslavia. See in particular chapters by Bieber, Swimelar, Trix, and Krasniqi.

† Bill Keller of the *New York Times* was an exception. In February 2002, in reference to the *Galić* trial and in anticipation of *Milošević*, Keller wrote that “[t]he trial, like most trials, is a tedious accumulation of detail, the bookkeeping of heartbreak. Hours are spent pinning down the precise location of a tram at the moment sniper bullets pierced its windows, hitting a woman and her 4-year-old daughter. This is where the banality of evil meets the banality of justice.” Keller, *Monster in the Dock*, N.Y. TIMES, 9 Feb. 2002.

\* These prohibitions extend to court staff, court officials, and others subject to the judge's control. *Cf.* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 2.10(c). The seriousness of this sort of restriction was demonstrated in *Milošević* when the Chamber dismissed *Amicus Curiae* Michail Wladimiroff for telling a Dutch reporter after the close of the Prosecution's case that Milošević would be found guilty of at least some charges. In August 2013, Judge Harhoff was removed from the *Šešelj* trial because he had sent a letter to friends, later leaked to the press, criticizing recent acquittals authored by Tribunal President Meron in a way which arguably suggested he, Harhoff, had a bias towards conviction.



\* Trix, at 242-244 and 246-247, strongly criticizes the alienating effects of written testimony, both on Kosovar media coverage and on popular interest in the trial among Kosovar Albanians. In his chapter, Boas is highly critical of the joinder decision, which Mégrét is more prepared to defend in his.

† Initially, the time Milošević spent on cross-examination was deducted from the time the Chamber allowed the prosecution to present its case, an inequity the Chamber later corrected.

‡ *Milošević case* (112), Trial Tr. 3674 (24 Apr. 2002). *See* Trix at 240-244, giving a similar example from the testimony of another Kosovar witness, Sadik Januzi.

\* I never found victim testimony banal, regardless of its repetition. The repetition both conceals and reveals the horror of what victims experienced. Others, however, did not see it this way.

† Drama, when it came, was not limited to victim testimony. Former Milošević allies and international interlocutors who testified for the Prosecution confronted him on a number of occasions.



\* The *Kosovo* phase was different, as no other trial had yet established the factual basis of crimes there.

† Bachmann discusses these documents, as do, with a different focus, Hartmann, Shany, Várady, and Prelec. On appeal Perišić was later acquitted on all counts.

‡ Victims were not only marginalized in the courtroom; they were largely absent from the audience. Bachmann focuses on the obstacles journalists from the former Yugoslavia confronted in attending the trial, but they were not the only ones: The Hague was simply at too great a distance for people from the former Yugoslavia to attend; indeed it was inaccessible. Had more individuals from the region been present, it is likely that journalists covering the trial would have been influenced by their opinions. But few sought them out.

§ As Bieber notes, the tendency to interpret the trial as a contest was prevalent in the media of the former Yugoslavia as well. Krasniqi similarly notes the effects of this inevitable focus on the defendant.

\* I served in this role for CIJ during most of the *Milošević* trial; Edgar Chen covered the final months.



† Among the media that regularly quoted or relied on background information from these NGOs were: *The New York Times*, *The Washington Post*, *BBC*, *Chicago Tribune*, *NPR*, *Canadian Broadcasting Corporation*, *Associated Press*, *Radio Free Europe*, *Voice of America*, *Wall Street Journal*, *Christian Science Monitor*, and *Reuters*, as well as media in all states of the former Yugoslavia and throughout Europe.

\* On 6 December 2004, President Tadić apologized to the Bosnian people for crimes committed by Serbs. *Serb Leader Apologizes in Bosnia*, BBC NEWS, 6 Dec. 2004. Tadić apologized to the victims of Vukovar on 4 November 2010. On the same day, Croatian President Ivo Josipović apologized to Serb victims for Croatian atrocities at Paulin Dvor. *Serb President Apologizes for Wartime Massacre*, MSNBC, 4 Nov. 2010. At Tadić's initiation, the Serbian Parliament passed a resolution on 30 March 2010, apologizing for the Srebrenica massacre. Dušan Stojanović, *Serbian Parliament Apologizes for 1995 Srebrenica, Bosnia Massacre*, ASSOCIATED PRESS, 31 Mar. 2010. See Kostovicova at 251-252, and Trix at 247-248, discussing apologies (or lack of them) by Serbs.

† These include Borisav Jović, Zoran Lilić, Milan Babić, Radomir Marković, Aleksandar Vasiljević, and Miroslav Deronjić.

‡ The Trial Chamber in *Perišić* relied extensively on minutes of the VSO, first introduced in *Milošević*, to convict the former head of the VJ of war crimes and crimes against humanity in Bosnia and Croatia but the Appeals Chamber, in overturning the conviction, found there was insufficient evidence to convict Perišić either on the basis of aiding and abetting or having command and control over seconded members of the VJ. Despite the acquittal, the documents constitute an important historical record. Examples of other documents unearthed for the *Milošević* trial include: the Kosovo war diaries of military officers; a map showing plans for the ethnic cleansing of Kosovo; minutes of the RS Assembly through 1995; telephone intercepts between Milošević and Karadžić discussing their plans for Yugoslav disintegration; records of Serbian officers and soldiers who served and were injured or killed in Bosnia and Croatia; a video of Milošević at a celebration of Serbia's *Crvene Beretke*, who fought in Croatia and Bosnia, in which Jovica Stanišić, head of the SDB, addressed Milošević, saying "Everything we have done so far we have done under your control and with your authorization[;]" (from reexamination of witness Dragan Vasiljković, 21 Feb. 2003) and the *Škorpijoni* video, discussed in several other chapters and in ARMATTA, TWILIGHT OF IMPUNITY. As with 'Perišić, however, both the relationship of those documents to claims about Milošević and their ultimate value in other cases is unclear: despite the compelling nature of the evidence, Stanišić and his co-accused Franko Simatović were acquitted at trial in 2013.

\* See Nielsen for a more detailed discussion of the scholarly and evidentiary value of *Milošević*. Hartmann discusses, with a more critical view, the Prosecution's shifting deployment of that evidence in related trials after *Milošević*. The value of those documents is far less certain after the recent spate of acquittals in cases that also relied heavily on them.



† See Trix and Surroi in particular on the experience of witnesses during the trial, and expressing skepticism about the healing experience of testifying, at least in the conditions in which it occurred in *Milošević*.

‡ See Swimelar for a discussion of Bosniak attitudes.

§ Examples include the conviction of Prime Minister Jean Kambanda and 45 others by the ICTR; the conviction of prison commandant Kaing Guek Eav “Duch” by the Extraordinary Chambers in the Courts of Cambodia and the trial of four top Khmer Rouge begun in June 2011; the conviction of Liberian President Charles Taylor by the Special Court for Sierra Leone; and the conviction, acquittal, trials, or indictments of several leaders from the Democratic Republic of Congo, Central African Republic, Kenya, Sudan, and Libya at the ICC.

\* Nuremberg was not the only factor in shift; the NBC miniseries *Holocaust: The Story of the Family Weiss* (1978) was a proximate spark for renewed discussion, in which the Nuremberg record was available to be drawn on. See Douglas, “The Holocaust, History and Legal Memory,” in *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE?* 115 (Ratner & Bischoff eds.).

\* In March 2012, the ICC found Thomas Lubanga Dyilo guilty of war crimes for using children as soldiers. *Pros. v. Lubanga Dyilo* (4), ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute (14 Mar. 2012). In December, the ICC acquitted Mathieu Ngudjolo Chui on all charges relating to the conflict in Ituri. See *ICC Acquits DR Congo “Warlord” Ngudjolo*, AL JAZEERA, 18 Dec. 2012.



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\* Nielsen makes this point, and Hartmann discusses the uses of evidence from *Milošević* in other trials, though she is critical of the Prosecution's changing strategy.

\* Four of its indictees are dead, but the ICC has indicted 32 people, more than the SCSL. *See* All Situations, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>.

† Saddam Hussein was executed before he could be tried in a much larger case that would have been critical to any narrative of his rule. *See* Mégret at 127, 129, and 133.

‡ Nielsen's chapter gives a defense of this view, and his and Prelec's chapters are themselves examples of it.



§ Dražen Erdemović's expression of remorse made a greater impression on the judges than is apparent from the restrained text of the judgment. *See Pros. v. Erdemović*, Sentencing Judgment (29 Nov. 1996). Thanks to Prof. Richard Wilson for this point. *See also* Bieber at 432-433 (discussing the *Škorpioni* video's impact in the former Yugoslavia).

\* Mégret discusses his related attitude towards joiner.

† *See Anoya's chapter regarding Milošević's approach.*

\* Milošević made one oblique reference to the Decision, when Judge Robinson reminded Milošević “the [Decision] was published and was available to you. But I bring that to your attention so we don’t waste time.” *Milošević case* (153), Trial Tr. 43693 (5 Sept. 2005). Milošević accepted the benefit the Decision conferred—its removal of certain allegations—but refused to actually read it (or to admit that he had).

† The day after they were appointed, the *Amici* announced that their “function will be best performed if [they] do not express individual views on the Milosevic case to the media.” ICTY, Press Release, Statement by the Amici Curiae Lawyers designated to the Milosevic case, CC/P.I.S./619-e (13 Sept. 2001). This was hardly Milošević’s approach, nor one most defense attorneys would adopt.



‡ For example, the *Amici* moved for dismissal of some allegations concerning forced removals from the village of Nogavac as part of *Kosovo* Count 1—deportation over an international frontier—but not from Count 2—transfer inside a state. *See Milošević case* (5), Amici Curiae Motion for Judgement of Acquittal ¶¶ 39–60 (3 Mar. 2004).

§ BOAS, MILOŠEVIĆ TRIAL 126–28. The last category included disagreements about the dates on which armed conflict in Kosovo began and Croatia became a state—issues affecting jurisdiction and that concerned a choice of legal theories as much as factual claims; the *Amici* also disputed the proper mens rea for JCE type III. *Milošević case* (1), 98*bis* Decision ¶¶ 5, 161–62.

\* *See generally Milošević case* (64), Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal (3 May 2004). For example, for *Croatia*, the Prosecution agreed that allegations concerning camps at Kumbor and Zrenjanin should be excised from counts 6 to 13, and Čelija should be excised from counts 17 to 20. *See id.* ¶¶ 200–02, 218–19.

† In part, of course, the Prosecution was relieved; no counts had been struck—a victory of sorts.

\* Large sections of the Decision consist of charts summarizing *Amici* challenges, Prosecution responses, and the Chamber's disposition. Without the underlying evidence, these anodyne recitations convey all the analytical depth of an "am not/are so" dispute. *See Milošević case (1)*, 98*bis* Decision ¶¶ 111–29.



† The judgment in the *MOS* trial, involving other members of the same JCE from the *Kosovo* phase, ran to four volumes. *Pros. v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević & Lukić* (3), Judgement Vol. 1-4 (26 Feb. 2009).

\* Judge Bonomy joined the Chamber only 16 days before the Decision was written, although he had been familiarizing himself with the case since the beginning of April. Communication from Lord Bonomy (December 2011). Evidence of his actual participation in drafting the Decision is not clear from its text.

\* As we have seen, the *Amici*, not the Defense, brought the motion, and did not seek acquittal on “the charges,” only certain counts.

\* *Bosnian Genocide* also discusses expert reports and testimony from Milošević: reports by András Riedlmayer on destruction of cultural heritage (called “persuasive evidence”) and Robert Donia on Serbian geopolitical aims, and testimony by Lord Owen and the Deputy Commander of Dutchbat. ICJ, *Bosnian Genocide* ¶¶ 339–43, 371, 412 respectively (26 Feb.) [*Bosnian Genocide*].

† The ICJ also discusses motions of acquittal from *Jelisić* and *Krajišnik*. See *Bosnian Genocide* ¶ 219. See Shany at 454-457 for discussion of other elements from the Decision used by the ICJ.

‡ In turn, the ICC relied on *Bosnian Genocide* in *Al Bashir*, “observ[ing] that a similar approach has recently been taken by the ICJ in its Judgment on Genocide,” listing several examples from *Bosnian Genocide*, and citing the same conclusions that rely in part on the Decision’s discussion of Luka Camp. *See Pros. v. Al Bashir* (1), Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir ¶ 194 & n.221 (4 Mar. 2009).



\* *Milošević case* (1), 98bis Decision ¶¶ 41–82. And speaking at greater length—the Chamber discusses the cross-border element of deportation for over 20 paragraphs. *Id.* ¶¶ 47–69.

\* This suggests a curious feature of the authoritative narrative theory and of claims that ICL promotes reconciliation more broadly—the assumption that the narrative will be one of guilt.

† Indeed, *any* element of the trial process might be invoked, and not just at the ICTY. Proceedings to confirm charges at the ICC can have consequential, lawmaking functions: The *Lubanga* Pre-Trial Chamber, for example, discussed if the conflict was internal or international, examined the Prosecution's evidence and advanced its own interpretation. *See Pros. v. Lubanga* (1), Decision on the Confirmation of Charges ¶¶ 200–37 (29 Jan. 2007). If *Lubanga* had terminated prior to final judgment, the confirmation stage could have been invoked, as the Decision was by Del Ponte, to imply some measure of official review. Thanks to Prof. Mark Drumbl for this point.

‡ Significant trials that overlap with *Milošević* include *MOS*, *Stanišić & Simatović*, *Perišić*, *Karadžić*, and *Mladić*. See Hartmann's and Nielsen's chapters on this point.

\* HUM. RTS. WATCH, WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL 16. By contrast, the Trial Chamber took the Prosecution evidence at its highest.

† For example, on Belgrade's assistance to the VRS and SVK, both the Decision and the HRW report mention the same testimony. See HUM. RTS. WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL* 16, 36–37; *Milošević case* (1), 98*bis* Decision ¶¶ 261, 273, 271, 258.



‡ There do not appear to be any instances of the report actually doing this.

§ Plans to preserve the ICTY archives are ongoing; however, there are no plans to make all material, especially the most sensitive, public. *See* ICTY, The Mechanism for International Criminal Tribunals, <http://www.icty.org/sid/10874>; Donia, *ICTY Archive Must Be Open to All*, INST. FOR WAR & PEACE REPORTING (4 Apr. 2008), [http://www.iwpr.net/?p=tri&s=f&o=343812&apc\\_state=henh](http://www.iwpr.net/?p=tri&s=f&o=343812&apc_state=henh).

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\* *See* Bachmann, Armatta, Bieber, Krasniqi, Trix, and Drumbl on this.

\* Waters at 311-312.

\* *Milošević case (1)*, 98*bis* Decision ¶ 291 (June 16, 2004). Waters discusses this at 307; on JCE, *see also* van der Wilt.



\* On this concept, see van der Wilt.

\* Bonomy went on to chair the ICTY's Working Group on Speeding Up Trials, whose February 2006 report paved the way for the adoption of Rule 73*bis*, and also presided over the tightly run *MOS* trial.

† I write “reassert” because the Chamber had early on established its authority by imposing strict time limits on both the Prosecution and the Defense. HUM. RTS. WATCH, *WEIGHING THE EVIDENCE* 62–63 (2006).

‡ *Milošević case* (16), Decision on Motion for Judgement of Acquittal, Separate Opinion ¶ 11 (16 June 2004). Waters discusses Robinson's critique at length, at 305-306.

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\* Waters at 300.



\* It is hard to disagree with Richard Dicker, the director of the International Justice program at Human Rights Watch, who argued that “Milošević was not trying to rebut the charges against him but to conduct a political offensive.” Press Release, Hum. Rts. Watch, *Milošević Escapes Judgment, Not Justice Process* (10 Mar. 2006)  
<http://www.hrw.org/en/news/2006/03/10/milosevic-escapes-judgment-not-justice-process>.

\* Of course the adversarial nature of testimony in the courtroom, and in particular the often aggressive cross-examination to which witnesses are subjected, means that some witnesses are likely to produce their narratives in a different manner than they would in a session with a practitioner of oral history. *See* the collection of articles on Holocaust testimony, memory, and history in 27 POETICS TODAY (2006, v 2). In her chapter, Trix forcefully criticizes just this sort of difference between the treatment of oral and written testimony.

† Indications to date are, however, that the ICC is significantly less expedient in processing cases than the ICTY. *The International Criminal Court—Taking Stock*, Chatham House, 12 June 2008, [http://www.chathamhouse.org.uk/files/11735\\_il120608.pdf](http://www.chathamhouse.org.uk/files/11735_il120608.pdf). Precisely because of “the snail’s pace” of international criminal justice, especially in cases such as *Lubanga*, the widely respected British judge at the ICC, Sir Adrian Fulford, has called for “a wholesale reassessment of how international war crimes trials are conducted.” Rozenberg, *Standpoint* blog, 16 May 2010, <http://www.standpointmag.co.uk/node/3029>.

\* DOUGLAS, MEMORY OF JUDGMENT 2. Commenting on Justice Jackson's comment noted earlier, Dodd further writes that "The Nurnberg Trial was all of that and more. It was a detailed and exhaustive analysis, under judicial authority and through adversary proceedings, of the historical facts and forces, before and during the worst war in history. It was one of the most shocking conspiracy cases of all time. It was the greatest murder trial of record, covering, in a conservative estimate, six or seven million homicides, not including, of course, those killed in the armed services.... But it is more than a record; it is the written history of the first post-mortem on a catastrophe [*sic*] that cost millions upon millions of lives." Thomas J. Dodd, *in* METTRAUX, PERSPECTIVES ON NUREMBERG 190.

† After indictments were raised by the ICTY against leading Croat participants in Operations Flash and Storm that led to the collapse of the RSK and the exodus of most Croatian Serbs, the leadership of Croatia repeatedly and preemptively tried to assert the innocence of the accused, with the implication that, whatever the findings of the Tribunal might be, the “truth” had already been found. HINA, *Sanader: Oluja je sjajna ič ista pobjeda*, Vjesnik, 4 Aug 2008. With the acquittal on appeal of Gotovina, this strategy has become moot. See Lamont on the interactions of the ICTY and Croatian elite narratives.

‡ ICTY, *About the ICTY*, <http://www.icty.org/sections/AbouttheICTY>. See also the section “The Concept of Judgment as Authoritative Narrative,” in Waters.



§ *Pros. v. Karemera, et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice ¶ 35 (16 June 16 2006). This decision of ICTR has proven controversial and appears to have some very problematic consequences. Peter Erlinder, a U.S. law professor working as a defense lawyer for a Rwandan opposition politician accused of genocide, was arrested in Rwanda in May 2010 on charges of genocide denial. Erlinder holds very idiosyncratic revisionist views of the Rwandan conflict. Karnowski, *US Lawyer Held in Rwanda Critical of Its President*, SEATTLE TIMES, 2 June 2010.

\* One could add a third modality: the “making of history” in the sense of the trial being a historical event.

\* For a more detailed discussion of the Decision's procedural and doctrinal background, see Waters.

\* It is significant that in his separate opinion appended to the Trial Chamber's Decision, Judge Robinson noted that the ICC does not provide for a procedure equivalent to Rule 98*bis*—suggesting, perhaps, that already by the time the Rome Statute was being drafted there were doubts about the value of a midpoint evaluation. *Milošević case* (16), Decision on Motion for Judgement of Acquittal—Separate Opinion of Judge Patrick Robinson ¶ 4 (16 June 2004). The Rule 98*bis* process—which did not exist when the ICTY was established—has since been streamlined.

† As the Trial Chamber, the *Amici*, and numerous legal scholars have observed, Rule 98*bis* derives from the common law system and sits uneasily in the international judicial context. In common law systems, analogous rules serve to allow the judge to dismiss counts so as to prevent an error in law in case a lay jury were to convict on these counts despite no or insufficient evidence. BOAS, MILOŠEVIĆ TRIAL 122; Gaparayi, *The Milošević Trial at the Halfway Stage*, 17 LEIDEN J. INT'L L. 750–02 (2004) (“It is apparent that the rationale behind the sui generis ‘no case to answer’ mechanism at the ICTY, whereby, following a ruling that there is sufficient evidence to sustain a conviction on particular charge at the end of the prosecution case, it is nonetheless possible for the same trial chamber to acquit the accused at the end of the case (even where she or he calls no evidence) has left many at loss.”)

\* Here the *Amici* and the Chamber both referred to the test on the presence of armed conflict applied in *Tadić. Milošević* case (5), *Amici Curiae* Motion for Judgement of Acquittal Pursuant to Rule 98bis ¶ 17 (3 Mar. 2004).



\* The absence of any genocide convictions at the ICTY for the events of 1992 has caused several scholars to criticize the Tribunal strongly. For example, Edina Bećirević argues polemically that the Tribunal deliberately set about rendering a genocide conviction only for Srebrenica in order to whitewash the international community's failure to intervene decisively in Bosnia before August 1995. BEĆIREVIĆ, NA DRINI GENOCID, ISTRAŽIVANJE ORGANIZIRANOG ZLOČINA U ISTOČNOJ BOSNI (Buybook 2009); *see also* Attila Hoare, *Bosnia-Hercegovina and International Justice: Past Failures and Future Solutions*, 24 EAST EUROPEAN POLITICS AND SOCIETIES 191–205 (2010). Gow and Zverzhanovski also conflate the deficiencies of the Prosecution's case on genocide in *Milošević* with "the weakness of the case" as a whole. Gow & Zverzhanovski, *The Milošević Trial* 902. For a critique of the strong focus on genocide in evaluations of the ICTY, *see* Nielsen, *Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina*, 15 J. GENOCIDE RES. 21-39 (2013).

† Prelec discusses this tendency in some detail. *See also* Hartmann on the shifting Prosecution strategy toward Belgrade's involvement in genocide.

‡ *Milošević case (1) 98bis* Decision ¶ 138 (16 June 2004). In criticizing the Prosecution's approach to the genocide charge, Boas correctly notes that "the territorial scope, as well as the relevant target groups, of the prosecution case in respect of genocide was plagued by confusion and inconsistencies." BOAS, MILOŠEVIĆ TRIAL 124.

\* *Milošević case* (1), 98bis Decision ¶ 288. Although Judge Kwon disagreed that there was sufficient evidence to show that “the Accused had the *dolus specialis* required for genocide,” he agreed with his colleagues that “there is sufficient evidence upon which a Trial Chamber could convict the Accused of (i) genocide under the third category of joint criminal enterprise, (ii) aiding and abetting or complicity in genocide, or (iii) genocide as a superior under Article 7(3).” *Milošević case* (15), Decision on Motion for Judgement of Acquittal, Dissenting Opinion ¶ 2 (16 June 2004).

† More recent jurisprudence in *Popović et al.* suggests it is possible for several JCEs to coexist in space and time; that judgment found that at Srebrenica there were two separate but coexisting JCEs, only one of which was genocidal in intent. On this logic, Milošević could have been part of a non-genocidal JCE but *not* been part of or privy to a genocidal JCE. This was not the logic advanced by the Prosecution at the time, but nothing would have prevented the *Milošević* Chamber from reaching that conclusion, as *Popović* did not long after. *Pros. v. Popović et al.* (1), Judgement (10 June 2010). See summary overview at [http://www.icty.org/x/cases/popovic/cis/en/cis\\_popovic\\_al\\_en.pdf](http://www.icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf).

‡ Gaparayi worries that “one cannot help but wonder whether the combined effects of the decision in *Brđanin* and the judgment in *Krstić* has diluted the *mens rea* standard for criminal liability to attach to specific-intent offences under the Tribunal’s jurisdiction, including the very serious offence of genocide, resulting, as it were, in a notion of individual *mens rea* so stretched that it is completely stripped of any meaningful purpose.” Gaparayi, *Milošević Trial at the Halfway Stage* 765. On the use of JCE, see METTRAUX, *INTERNATIONAL CRIMES* 287–93; Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL L. REV. 75 (2005). On 20 May 2010, the Pre-Trial Chamber in the Extraordinary Chambers in the Courts of Cambodia issued a ruling effectively dismissing this modality of JCE, commonly called “JCE III.” Extraordinary Chambers in the Courts of Cambodia, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)* (20 May 2010).



\* Milutinović, Šainović, Ojdanić and Stojiljković were originally jointly indicted with Milošević, but their trials were severed. Milošević was later mentioned as a member of the JCE in other indictments related to Kosovo (of Nebojša Pavković, Sreten Lukić, Vladimir Lazarević, and Vlastimir Đorđević), but they were not mentioned by name in the indictment of Milošević for the Kosovo conflict.

\* Jose E. Alvarez describes the judgment as an “historical overview [that] adopts an authoritative tone, with little reference to the evidence that led its authors to their conclusions[.]” Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2046 (1998).

† See Boas' chapter. *See also* BOAS, THE MILOŠEVIĆ TRIAL 115–17.

‡ Boas acerbically notes that the acceptance of “Greater Serbia” as a “common purpose” at the ICTY is so broad that it could theoretically justify a joinder “encompassing all indictments against Serbs before the ICTY[.]” Boas at 118.

§ BOAS, THE MILOŠEVIĆ TRIAL 169. In *Milošević*, Audrey Helfant Budding, a Harvard PhD, testified as a Prosecution expert witness on “Serbian Nationalism in the Twentieth Century: Historical Background and Context,” *Milošević case* (56), Prosecution Exhibit 508. Arguably, however, Helfant Budding’s more nuanced treatment of Serbian nationalism was not reflected in the Prosecution’s case theory. The marathon case against the ultranationalist Serb political and paramilitary leader Vojislav Šešelj illustrated the profound difficulties of proving a war crimes case primarily based on ideology. In this sense, the Prosecution at the ICTY seems to have committed some of the same mistakes made by the Nuremberg prosecutors in their case against Julius Streicher.

\* *See* Hartmann especially at 480 *ff.*



\* The case against Milutinović, Ojdanić, and Šainović was later severed—thus the nickname “MOS”—and as a result of case joinders, was expanded in 2005 to include Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević, and Sreten Lukić. Owing to his late apprehension, Đorđević was tried separately. Vlastimir Stojiljković, the Serbian Minister of Internal Affairs at the time of the war in Kosovo, was also charged in the original 1999 indictment. He committed suicide on the steps in front of the federal Parliament in Belgrade in 2002 after a law permitting extraditions of Serbian and Yugoslav leaders to the ICTY had been passed.

† In *MOS*, evidence from *Milošević* was admitted in several different ways. For witnesses whose testimony did not directly address the activities of the accused in *MOS*, statements were admitted through Rule 92*bis*. In cases where witness testimony bore directly on the conduct of the accused, they were cross-examined in court under Rule 92*ter*. It should be noted that two important witnesses in both cases, the Kosovar Albanian leader Ibrahim Rugova and the Croatian Serb leader Milan Babić, had died by the time of the *MOS* trial. Their statements were admitted under Rule 92*quater*, which specifically deals with witnesses unable to testify in court.

\* The testimony of key insider witnesses such as Milan Babić, former Yugoslav president Zoran Lilić, and JNA General Aleksandar Vasiljević in *Milošević* gives a good sample of the richness of detail available in the transcripts. For a very brief summary, see Gow & Zverzhanovski, *Milošević Trial: Purpose and Performance*, 32 NATIONALITIES PAPERS 910–01 (2004).

\* Scharf, *Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 916 (2003). Scharf, writing at what he optimistically assumed to be the midway point of the trial, also viewed the potential outcome through a binary lens: Either a guilty verdict would be pronounced and the resulting record would “educate the Serb people,” or the trial would be perceived as “victor’s justice” and would “add to the Serb martyrdom complex.” This assumed that only a guilty verdict could be a successful trial, which itself would feed the perception among Serb critics that the trial was a show trial. Indeed, it mirrors the view by these critics that only an acquittal could prove that the Tribunal was fair.

† Both the State Court in Bosnia and the Special Court for War Crimes in Serbia have issued judgments in war crimes cases, and they could be analyzed in the same manner as is done here for the cases at the ICTY. Indeed, some of the cases at the State Court in Bosnia were referred to the Court by the ICTY. To date, however, the conduct of war crimes cases in Serbia has been criticized for focusing only on direct perpetrators, and hence consciously avoiding the investigation and prosecution of leadership figures.

\* Intentionalism and functionalism are the two polar opposites in what A.D. Moses has appropriately called “the deep structure of Holocaust scholarship.” Roughly speaking, intentionalism holds that Adolf Hitler and the Nazi elite intended from the outset to exterminate European Jewry. By contrast, functionalism sees the massive scope of the Holocaust as stemming in large part from competing Nazi organizations striving to achieve Hitler’s aims. The analogous debate in *Milošević* revolved around the extent of Milošević’s criminal intent (and his genocidal intent, if any) and the degree to which Bosnian Serb and Croat Serb civilian and military leaders were acting independently or according to a grand plan for the creation of a Greater Serbia. Moses, *Structure and Agency in the Holocaust: Daniel J. Goldhagen and His Critics*, 37 HISTORY AND THEORY 194–219 (May 1998).



† Several other chapters—Prelec, Shany, Bachmann, and Hartmann in particular—discuss the role of the VSO documents, parts of which were released through the *Milošević* trial process.

\* For example, Ratko Mladić's wartime diaries contain significant information pertaining to Milošević, as well as other ongoing cases. *Dnevnici Ratka Mladića*, POLITIKA, 29 May 2010, <http://www.politika.rs/rubrike/tema-dana/Skinite-anatemu-se-mene-i-Karadzica.sr.html>; Ahmetasevic, *Mladic Diaries May Sway Several Hague Trials*, BALKAN INSIGHT, 24 June 2010, <http://www.balkaninsight.com/en/article/mladic-diaries-may-sway-several-hague-trials>; *Prosecution: Mladic's Diaries Are Evidence against Mladic*, SENSE TRIBUNAL, 22 June 2012, [http://www.sense-agency.com/icty/prosecution-mladic%E2%80%99s-diaries-are-evidence-against-mladic.29.html?cat\\_id=1&news\\_id=14126](http://www.sense-agency.com/icty/prosecution-mladic%E2%80%99s-diaries-are-evidence-against-mladic.29.html?cat_id=1&news_id=14126). On the diaries, see Prelec at 26.

† This will also require judicious decisions with respect to testimony and documentary evidence submitted under seal to the Trial Chamber.

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\* Resolution 827, establishing the ICTY, noted that the Tribunal should “contribute to the restoration and maintenance of peace[.]” The purpose of the Tribunal is thus broader than just establishing individual responsibility. However, in the context of the trials themselves, the primary purpose is to determine the responsibility of those accused. S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993).

\* Necessary, that is, in order to meet the legal standards for joinder. *See* Boas. In his chapter and his book, Boas effectively argues that the Prosecution's understanding of Greater Serbia changed over time and introduced confusion into the case against Milošević. *See* Boas at 108-110; BOAS, MILOŠEVIĆ TRIAL 90–92. A similar critique can be made about the Prosecution's closely related decision to base the charges against Milošević on a JCE theory. *See* van der Wilt on this point.



† They can matter in so-called special intent crimes, such as genocide. Still, the general point is the same—there will be questions of motivation and context that necessarily go beyond the core inquiry that interests a court, but which may constitute the heart of the inquiry for historians.

\* As officers of the court, members of the Prosecution have obligations to present exculpatory evidence. However, this still leaves considerable leeway to craft and characterize the information selected for trial.

\* Milošević notoriously asked a witness, the former Montenegrin Minister of Foreign Affairs, Nikola Samardžić, whose legs had been amputated, “Mr. Samardzic, do you know the Serbian saying that people who lie have short legs?” *Milošević case* (131), Trial Tr. 11401 (10 Oct. 2002).

† Compare Trix on a similar point about oral and written testimony and marginalized communities.

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\* VSO Stenographic Notes 5 (6 Dec. 1995). Milošević was describing an incident in which the VRS captured José Souvignet and Frédéric Chiffot, two French pilots shot down in August 1995, and refused to release them until December 1995; Mladić tried to use the captives to extort changes to the Dayton Agreement and protect himself from prosecution, among other demands. *See Milošević case* (140), Testimony of Zoran Lilić (9 July 2003); *Skinite anatemu se mene i Karadžića* [*Remove the anathema from me and Karadžić*], POLITIKA, 29 May 2010, <http://www.politika.rs/rubrike/tema-dana/Skinite-anatemu-se-mene-i-Karadzica.sr.html>, for much more detail on this episode.



† VSO Stenographic Notes 7 (6 Dec. 1995). Milošević reported making almost the same point to Bosnian Serb president Radovan Karadžić almost two years earlier: “I told Radovan to make some radical cuts, which would let him keep territory on the left bank of the Drina [river], the ‘corridor’ and the Bosnian Krajina, and not to cling desperately to every bit of the Sarajevo province.” VSO Stenographic Notes 58 (12 Mar. 1993).

\* Anglo-American conspiracy is a distinct offense, but for the ICTY participating in a JCE is only a mode of liability, though the two share many features.

\* Hierarchical responsibility arises from the ICTY Statute's Article 7(3), by which a criminal act committed by a subordinate "does not relieve his superior of criminal responsibility," a curiously indirect phrasing; *see* Damaška, *Shadow Side of Criminal Responsibility*, 49 AM. J. COMP. L. 455 (2001). JCE-based responsibility was imported into "committing" by the *Tadić* Appeals Chamber; *see* Danner & Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 104ff. (2005). Aiding and abetting likewise derive from Article 7 (1). On JCE, *see* also Boas, Mégret, and van der Wilt.

<sup>†</sup> *Milošević case* (68), Prosecution's Second Pre-Trial Brief ¶ 2 (31 May 2002). I was the editor of this brief and one of the principal authors of many of its sections, including the passage cited here.

\* This applies mostly to Bosnia. Much of the material in the *Croatia* section of *Milošević* was new; the ICTY had only issued indictments related to three specific crimes against Croats, *Pros. v. Martić* (2), Initial Indictment (25 July 1995), charging Milan Martić with ordering the rocket attack on Zagreb; *Pros. v. Mrkšić et al.*, Initial Indictment (26 Oct. 1995) charging Mile Mrkšić and others with mass killing of prisoners in Vukovar; and *Pros. v. Strugar, et. al.*, Initial Indictment (22 Feb. 2001) charging Pavle Strugar and others with shelling Dubrovnik. Kosovo was different. There, Milošević was originally charged with four others (*Pros. v. Milošević, Milutinović, Ojdanić, Šainović & Stojiljković*, Indictment (22 May 1999)) while the crimes in question were still being committed, so there was no existing base of indictments on which to build.

† Carla Del Ponte stressed that when she said “no state or organisation is on trial here today” she was not merely referring to the Tribunal’s statutory limitation to individual crimes, but affirming a broader philosophical point: “Collective guilt forms no part of the prosecution case. It is not the law of this Tribunal, and I make it clear that I reject the very notion.” *Milošević case* (81), Trial Tr. 4:10-12 (12 Feb. 2002).



‡ The VSO's voting members were the president of the FRY and the presidents of its two federal states, the Republic of Serbia and the Republic of Montenegro; other senior officials, such as the VJ chief of staff, attended as well. The VJ took orders from the president of the newly declared FRY, but could only command in accordance with policy previously agreed by the VSO, of which Milošević was a member. Milošević insisted on this point: "The Supreme Commander cannot [issue orders]; the Supreme Defense Council makes decisions, that is what it says in the constitution. The Supreme Commander does not have the right to make any decisions without a decision of the Supreme Defense Council; get that idea out of your heads." VSO Stenographic Notes 22 (10 Feb. 1993).

The VSO's meetings were recorded and transcribed, and during the course of the trial the ICTY obtained copies of most of these transcripts. As the senior researcher for the *Milošević* case, I read the original VSO transcripts in Belgrade when they were first made available to the ICTY, and reread them on many occasions thereafter. Some passages of these documents have since been placed under seal; others are publicly available on the ICTY's Web site. There has been a great deal of—in my view wholly unnecessary—controversy over these materials, and as is common when evidence is withheld from public view, conspiratorial theories abound. I have read all of the documents in question, including the nonpublic sections; everything I say in this chapter is supported by material that is not under seal; nothing I say in this chapter is inconsistent with anything I learned while working at the ICTY.

\* VSO Stenographic Notes 16 (2 June 1993). Hyperinflation makes it hard to estimate how much this sum was worth, but by comparison, the National Bank issued 10 trillion dinars in new money during the same period; *id.* at 2.

† VSO Stenographic Record 8-16 (12 Mar. 1993). Radoje Kontić, the federal prime minister, reported “the federal budget is 11.4 percent of the national product, the budget of Serbia is 42 percent of GNP and Montenegro is 2.31 percent. Half of 42 percent is extra-economic spending that you give as support to the Serb Krajinas; last year it was 30 percent.” Milošević claimed this was only nonmilitary aid, but even if this were true, it would still have left the Croatian and Bosnian Serbs with much more to devote to the war effort, and would have meant that half of Serbia’s budget, plus much of its contribution to the federal budget, went to the Bosnian and Croatian Serbs. VSO Stenographic Record 8 (12 Mar. 1993).

\* The Prosecution argued Milošević had de facto authority over JNA troops around Sarajevo up to 19 May 1992, in that they were under the command of the rump Yugoslav presidency, all of whose members were Milošević's allies; as of 20 May 1992 the JNA and the VRS were separate, and command authority for the latter passed to the Bosnian Serb leadership. *See Milošević case* (68), Prosecution's Second Pre-Trial Brief 31-2 (31 May 2002). Most of the specific allegations of shelling and sniping were thrown out at the end of the Prosecution phase; *see* Waters at 303, 304-305.

\* *Milošević case (1) 98bis* Decision ¶¶ 310–15 (16 June 2004). The Decision is unfortunately ambiguous about the role of “overview evidence” not related to any specific incidents, and whether Milošević was at jeopardy only for the two remaining sniping and shelling incidents or for the whole Sarajevo campaign they were meant to illustrate. *See* Waters at 303, 304-305, discussing this in detail.

\* VSO Stenographic notes, 7 Aug. 1992, public redacted version, at 19. “Captain Dragan” was Dragan Vasiljković, who is awaiting extradition from Australia to Croatia on war crime charges. *Sud odbio odbranu Kapetana Dragana* [Court rejected Captain Dragan’s defense], NEZAVISNE NOVINE, 19 May 2010, <http://www.nezavisne.com/novosti/ex-yu/Sud-odbio-odbranu-Kapetana-Dragana-60180.html>. “Mauzer” was Ljubiša Savić, commander of a group called the Panthers, who was later killed; see *Pros. v. Popović* (2), Testimony of Novica Simić *passim* (24 Nov. 2008). On all these, see also *Milošević case* (24), Exhibit 389.8a (28 July 1992) (Report of Col. Zdravko Tolimir on paramilitary units in the RS).



\* On Srebrenica, *see* Sec. IV, below. In their own trial, the Prosecution alleges that “Several weeks before the attack” on Srebrenica, Stanišić and Simatović “ordered the Scorpions to travel from their base in Delotic [*sic*] in Croatia to Serb controlled area near Sarajevo.” *Pros. v. Stanišić & Simatović* (2), Second Amended Indictment 10–11 (20 Dec. 2005). On the impact of the tape, see Hartmann and Bieber.

† The *Milošević* Chamber found that although the video has “probative value in relation to the underlying offences charged in the indictments,” it is not “of significance for the ultimate legal question of whether the Accused is responsible for the crimes alleged in the indictments” and would not “add significantly to the existing evidence relating to the Accused’s individual criminal responsibility.” *Milošević case* (11), Decision on Application for a Limited Reopening of Prosecution Case ¶ 38 (13 Dec. 2005). Of course, this could mean there was already enough evidence to convict, though given Judge Kwon’s earlier dissent in the Rule 98bis Decision, this seems unlikely; see Waters at 307. On the Prosecution’s different approaches in *Milošević* and in *Stanišić & Simatović* to events surrounding Srebrenica, see Hartmann.

‡ *Milošević case* (28), Exhibit P390.3a 6 (19 Feb. 2003). Milošević told Mladić on 30 June 1995 that he had spoken to the breakaway Bosniak chieftan Fikret Abdić, and decided that “we must do something so he can take Cazin,” and that “it is important to resolve the [ARBiH] 5th Corps,” which Abdić faced, “as soon as possible[.]” *Pros. v. Gotovina et al.* (3), Exhibit D01465.E 4099 (2 June 2009) (Excerpts from Mladić’s diary).

§ For example, during the 31 July 1992 VSO session, Dobrica Ćosić instructed one of his ministers to go talk to Karadžić about the problem, as he was just around the block in Belgrade's Hotel Intercontinental. VSO Stenographic notes 27 (31 July 1992).

\* Though well-disposed to Mladić, Milošević was not above twisting his arm. Milošević tried to use the VJ's financial straits as a lever to move Mladić's friends in the officer corps to use their influence on him: "I suggest that we immediately tell our dear colleagues in the Army [that] we can resolve the question of the budget right away...under one condition—let them convince their friends, headed by Ratko Mladić, to sign the peace plan, to lift the sanctions, and there will be no problem with the Army having a budget of three billion[.]" VSO Stenographic notes 13 (9 Dec. 1994) (public redacted version).

† The conversation was intercepted by Croatia's intelligence service, and appears to be the only surviving record of Milošević speaking to Mladić.



\* VSO Stenographic notes 3 (5 Aug. 1995) (public redacted version). Another speaker, probably Milošević (continuing from a redacted page), had a more realistic judgment: “They didn’t even defend it, because based on all the reports we have from the police, citizens and others, as soon as the artillery preparation stopped at seven in the evening, they ordered—a headlong flight!” *Id.* at 24.

† *Pros. v. Gotovina et al.* (1), IT-06-90, Exhibit D01465.E 4096, Meeting between Milošević, Bulatović, Perišić and Mrkšić, 29 June 1995 (2 June 2009) (Excerpts from Ratko Mladić’s diary selected by the *Gotovina* defense (English translation)). Hrvoje Šarinić thought the same, namely that Milošević believed “the Muslims could not hold out in [Srebrenica] and that was enough for him.” *Milošević case* (29), Exhibit P641.2 12, Statement of Hrvoje Šarinić (21 Jan. 2004).

\* The initial orders had been issued by Karadžić and Mladić in March 1995; VRS forces were moving into position in May, taking a UN observation post on 31 May. *Pros. v. Krstić* (2), Judgment ¶¶ 28–30 (2 Aug. 2001).

† And not only his: Indeed, Milošević described the territorial swap of the eastern enclaves for Serb-held land around Sarajevo as the “American plan” to “correct the maps[.]” VSO Stenographic notes 25 (5 Aug. 1995) (public redacted version).

‡ *See* Hartmann at 472.

§ See Waters' discussion of the Rule 98*bis* Decision and Kwon's dissent.



\* VSO Stenographic notes 29 (2 June 1993) (public redacted version) and *id.* 13 (13 Jan. 1995) (public redacted version). Milošević linked this to Karadžić's reputation as a gambler: "It's the logic of a gambler who's losing, and thinks he will win it back, and in the end loses everything! He actually is a gambler—you all know that—but he shouldn't gamble with the state!" VSO Stenographic notes 28 (11 Nov. 1994) (public redacted version).

\* VSO Stenographic notes 58 (12 Mar. 1993). These are, of course, the main components of the RS as agreed at Dayton.

\* Until recently, even the public record was public in name only; trial exhibits were in practice unavailable to the public. Though this has now changed, sifting through thousands of exhibits remains a task only professional historians are likely to attempt. Those interested should experiment with the ICTY's new Court Records database (<http://icr.icty.org>), which provides access to public exhibits and filings, though using it remains a challenge. The database contains only selected exhibits, usually only for completed cases; the ICTY's "public" exhibits are thus often not accessible to the actual public. *See, e.g., Pros. v. Šešelj* (2), Decision regarding public access to exhibits (18 Sept. 2008).

\* In September 1995, Milošević told Šarinić that at the upcoming (Dayton) conference, they should “see to it that the roof of Bosnia and Herzegovina was as thin as possible,” and that “we are each going to annex our part of BiH.” *Milošević case* (29), Exhibit P641.2 12 (21 Jan. 2004) (Statement of Hrvoje Šarinić).

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\* Prelec at 360, 375-376.



† Serbia's May 2012 presidential election resulted in victory for Tomislav Nikolić, a former member of the ultranationalist SRS whose denial of genocide at Srebrenica and other statements have produced a chilling of relations with Serbia's neighbors. Nevertheless, the Nikolić presidency has also provided affirmation of the general moderating trend in Serbian politics, as thus far, the state remains committed to European integration and to the peaceful resolution of Kosovo's status.

‡ See generally Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 134–35 (2009); Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 590–99 (2007). This institutional ideal played an especially prominent role in the establishment of the ICC, whose institutional design emphasizes prosecutorial independence rather than Security Council control. The ICTY's first Prosecutor has depicted the course of international criminal justice in evolutionary terms, according to which the ICTY and ICC each reflect "a further step down the road from partiality to impartiality." Goldstone & Bass, "Lessons from the International Criminal Tribunals," *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 51, 51–52 (Sewall & Kaysen eds.).

\* Thus Tadić was arrested in Munich after being recognized by Bosniak refugees; the German authorities then transferred him to The Hague at the ICTY's request, after the Prosecution obtained an indictment. The utility of the transfer remains suspect, however, as the German prosecution was prepared to pursue the case in their own courts. The Court's second apprehended suspect, Dražen Erdemović, was a foot soldier who participated in a firing line under duress after Bosnian Serb forces overran the Srebrenica enclave. Erdemović came to the Tribunal's attention only after remorse drove him to confess his deeds to a journalist. Erdemović's conviction for war crimes was problematic considering that duress would likely have provided a complete excuse in many legal systems, including the former Yugoslavia's. Sustaining his conviction required the Appeals Chamber to adopt, as a matter of judge-made law, the traditional, common law approach rejecting duress as a complete defense to murder. One could be forgiven for concluding that the ICTY's interest in pursuing these defendants was rooted primarily in the desire to have cases to try. *See Pros. v. Tadic* (1), Opinion and Judgment ¶¶ 6–9 (7 May 1997); *Germany to Extradite War Crime Suspect*, N.Y. TIMES (1 Apr. 1995); Greenawalt, *Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1064–67 (2011).

\* In his memoir of the Balkan peace process, Richard Holbrooke recalls explaining to Milošević that “Karadzic and Mladic cannot go to an international conference. They will be arrested if they set foot in any European country. In fact, if they come to the United States, I would gladly meet them at the airport and assist in their arrest.” HOLBROOKE, *TO END A WAR* 107. *See* Bassiouni on Holbrooke’s negotiations, at 100-101.

\* In making this point, I do not question Goldstone's assertion that he lacked the evidence to indict Milošević and that he would have pursued an indictment had the available evidence supported one. Indeed, a major focus of Prelec's chapter is the weakness of the Prosecution's case against the Serbian leader for crimes committed before 1999, even after the Prosecution—with the benefit of additional evidence—succeeded in obtaining indictments for those offenses. My point is simply that the political arguments Goldstone invokes to demonstrate a link between indictment and peace would also, in 1995, have argued against indicting Milošević. *See* GOLDSTONE, *FOR HUMANITY* 107 (“To indict Milošević it was necessary to establish before a criminal tribunal that he was a party to the crimes committed by the Bosnian Serb Army. Had there been such evidence he would have been indicted.”).

† Serbian authorities eventually arrested and transferred Karadžić during the summer of 2008; Mladić was arrested and transferred in May 2011.



\* For discussions of the indictment process, *see* Williamson and Bassiouni.

† See Williamson at 79-91 (discussing an inside account of the *Kosovo* indictment process).

\* *See* Williamson at 90-91.

† *See* Bieber and Krasniqi (on the post-Milošević era, Milošević's continuing influence, and that influence's limits), and Várady at 461-464 (the trial's influence on the ICJ).

\* *See, e.g.*, Swimelar at 188-189; *cf.* Bieber at 430-433.

† For an analysis developing this point in greater detail, see Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 647–50 (2007). *See also* Mégret (developing a similar theme in connection with the joinder procedure), and Waters at 297-299 (discussing narrative theories of ICL's effects).



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\* According to the pollster Strategic Marketing, over 60 percent of Serbian citizens tuned in to the trial in the first days, a higher rating than even for the extremely popular Latin American soap operas. Asked to rate Milošević's defense on a scale of one to five, 41.6 percent gave him five (the top mark), one-fifth gave him a four and another fifth a three; 5 percent gave him a two, and 11.6 percent were completely dissatisfied with his performance (BETA, 22 Feb. 2002). *See* Bieber's chapter.

† An analysis of the impact on public opinion is provided in Bieber's chapter. *See also* ORENTLICHER, SHRINKING THE SPACE FOR DENIAL 108–23 and Gordy, *Rating the Sloba Show: Will Justice Be Served?*, 50 PROBS. OF POST-COMMUNISM 53–63 (2003).

‡ These problems are elaborated by Boas, Prelec, and Waters in their chapters. *See also* BOAS, MILOŠEVIĆ TRIAL; Gow & Zverzhanovski, *Milošević Trial: Purpose and Performance*, 32 NATIONALITIES PAPERS 898–919 (2004).

\* These critiques are listed in ORENTLICHER, SHRINKING THE SPACE FOR DENIAL and can also be found in Dimitrijević, *Justice Must Be Done and Seen to Be Done: The Milošević Trial*, 11 E. EUR. CONST. REV. 59 (2002) (noting, at 60, that “rather than taking up the first and worst occurrences, Milošević’s indictment for crimes in Bosnia and Croatia came only after the indictment for Kosovo” and the Prosecution, “unexpectedly, as in a post-modernist play, started showing the final act first.”). The implications of this initial focus on Kosovo as a memory trigger are discussed later in this chapter. But on the sequencing of the cases, see Del Ponte at 142-143.

† McMahon & Forsythe, *ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics*, 30 HUM. RTS. Q. 412 (2008). *See also* SUBOTIĆ, HIJACKED JUSTICE 38–82, as well as Bieber's, Krasniqi's, and Trix's chapters.



‡ Many of these individuals' political origins are found in the dissident activism of the "Belgrade critical intelligentsia" during the 1970s and 1980s, with its various committees for the defense of free thought and expression and its petitions for the respect of human and civil rights. *See* DRAGOVIĆ-SOSO, "SAVIOURS OF THE NATION": SERBIA'S INTELLECTUAL OPPOSITION AND THE REVIVAL OF NATIONALISM.

\* For example, the journalists Dejan Anastasijević and Jovan Dulović testified for the Prosecution in the *Milošević* trial about crimes committed in Croatia, whereas Nataša Kandić, a human rights activist and director of the Belgrade NGO Humanitarian Law Centre, supplied the Prosecution with the documentary footage of Serbian paramilitaries killing Bosniak civilians in Srebrenica in 1995 known as the *Škorpioni* video (also discussed in Bieber's and Popović's chapters).

† D.I. *Teškoba pred zločinom*, REPUBLIKA, 1–31 Oct. 2002. Only a few months after the debate ended in November 2002, it was published in book form by one of the NGOs whose members had been involved. *Tačka razlaza*, 16 HELSINŠKE SVESKE (2003). It should, nevertheless, be noted that not all individuals who took part in the debate were members of *Druga Srbija*; lines of allegiance were at this point becoming more fluid.

\* This perception was reinforced by Đinđić himself, who justified Milošević's handover as a purely financial transaction, without engaging in any discussion of the moral imperatives of trying Milošević for crimes committed in Kosovo, Croatia, and Bosnia. *See* SUBOTIĆ, *HIJACKED JUSTICE* 46.

\* *See also* Bieber at 420-422.

\* Smajlović, *Činjenice i reagovanja*, Vreme, 29 Aug. 2002. The problems with some of the witnesses are acknowledged by Del Ponte at 143-145, 147-148.



† This was also noted by respondents in ORENTLICHER, SHRINKING THE SPACE FOR DENIAL and by Dimitrijević, *Justice Must Be Done and Seen to Be Done*. See also Surroi's chapter.

‡ In the subsequent *Croatia* and *Bosnia* phases of the trial, there were more insiders willing to testify against Milošević, and their testimony proved invaluable in establishing the links between him and the Serbian armies in the two neighboring republics, as well as between the Serbian Ministry of the Interior and Serb paramilitary groups who were responsible for some of the most heinous crimes in the 1990s. Nenad Lj. Stefanović, *Spuno žara i na brzinu*, VREME, 29 Aug. 2002.

\* Rajić, *Pravo na treće mišljenje*, VREME, 29 Aug. 2002.

\* *See, e.g.,* Krasniqi at 214-216.

† Estimates of the numbers of civilians killed in NATO's bombing raids ranges from 500 to 1500. The first statistic is given by Hum. Rts. Watch, *Civilian Deaths in the NATO Air Campaign*, Report no. 1 [D], vol. 12 (Feb. 2000), <http://www.hrw.org/reports/2000/nato>, and the second by Grupa-17, *Završni račun* (Stubovi kulture 1999). The Humanitarian Law Center in Belgrade has published statistics for civilian deaths in Kosovo between 1998 and 2000, putting the toll for Albanians at between 8,000 and 10,000 and for Serbs and other nationalities at 2,000–2,500. Its research is still ongoing. Fond za Humanitarno Pravo, *Kosovska knjiga pamćenja*, <http://www.hlc-rdc.org/stranice/Linkovi-modula/Kosovska-knjiga-pamcenja.sr.html>.

‡ The signatories included 15 university professors, along with representatives of the independent media, culture, and NGOs: Stojan Cerović, JovanĆirilov, SimaĆirković, Mijat Damjanović, Vojin Dimitrijević, Daša Duhaček, Milutin Garašanin, Zagorka Golubović, Dejan Janča, Ivan Janković, Predrag Koraksić, Mladen Lazić, Sonja Liht, Ljubomir Madžar, Veran Matić, Jelica Minić, Andrej Mitrović, Radmila Nakarada, Milan Nikolić, Vida Ognjenović, Borka Pavičević, Jelena Šantić, Nikola Tasić, Ljubinka Trgovčević, Srbijanka Turajlić, Ivan Vejvoda, and Branko Vučićević.



\* Kandić, *Neprijatelj u Srbiji*. She had traveled to Kosovo during this time, collecting evidence of such crimes, but was told by one of the *Vreme* journalists that the magazine could not publish this because of the risk that it would be closed down.

† Nadežda Radović, *Pismo pod bombama*, Vreme, 12 Sept. 2002. Two years after the *Vreme* debate, Stojan Cerović compared the preparations for the bombing to those leading to the invasion of Iraq in 2003. CERović, *IZLAZAK IZ ISTORIJE 1999–2004*, at 19.

\* Notably, many Serbs found the ICTY's indictment policy biased, with a much larger number of Serb political and military leaders being put on trial than Croats and Bosniaks, and particularly no KLA leaders being indicted until 2005. They also saw the Prosecution's indictment of Milošević in May 1999, at the height of the bombing campaign, and the dismissal of any allegations of NATO war crimes following a perfunctory Inquiry in June 2000 as proof that the ICTY was an instrument of NATO. See, e.g., Đilas, *Viewpoint: The Politicized Tribunal*, IWPR's Tribunal Update no. 230, [Part 1](#) (16–21 July 2001), <http://iwpr.net>. On problems with the Inquiry, see also Waters, *Unexploded Bomb: Voice, Silence and Consequence at the Hague Tribunals: A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT'L L. & POL. 1015 (2003).

† Waters at 298.

\* The first NATO bombing of Bosnian Serb targets took place in April 1994, two years into the Bosnian war, followed by more air strikes later that year and in 1995, and the bombing of the FRY in 1999. On military intervention in Bosnia, see SHOUP & BURG, WAR IN BOSNIA-HERZEGOVINA.

\* In the political sphere, the first of these narratives is best represented by the *Liberalno-demokratska partija* (Liberal Democratic Party) of Čedomir Jovanović, and the second by the *Demokratska stranka* (Democratic Party or DS) of Borislav Tadić.



† This was particularly apparent in the 2010 parliamentary debates leading to the adoption of two declarations—one on Srebrenica and one on Serb victims—in March and October that year. In fact, even the Serbian Parliament's Declaration on Srebrenica contained a reference to the need of other sides in the wars of the 1990s to apologize for their own crimes against Serbs, thus minimizing the specificity of the Serb forces' genocide against Bosniaks at Srebrenica and producing a morally problematic apology. See Dragovic-Soso, *Apologising for Srebrenica: The Declaration of the Serbian Parliament, the European Union and the Politics of Compromise*, 28(2) EAST EUROPEAN POLITICS (July 2012).

\* Dr. Vesna Pešić is a member of the Serbian Parliament. She founded the Center for Antiwar Action (now the Center for Peace and Democratic Development) and serves as President of its Board. She was a founder and first president of the Civic Alliance of Serbia, one of the three leaders of the *Zajedno*, and first coordinator of the Alliance for Change. Dr. Pešić served as Serbia and Montenegro's ambassador to Mexico from 2001 to 2005. Thanks to Carla Tumbas for assistance with translation of quotes from *Peščanik*.

\* I have also studied *The Helsinki Charter*, a monthly bulletin of the Serbian Helsinki Committee, and conducted a number of interviews with the actors and witnesses of the conflict within *Druga Srbija*.

† The chapter utilizes memoirs, academic literature, and interviews with a number of participants involved in the political conflicts regarding Milošević's arrest and transfer to the ICTY.

\* Đilas was against the Serbian war project; he was also known for his dissident activities against Tito's Yugoslavia.

\* According to historian Dubravka Stojanović, the opposition was unable to delegitimize Milošević's national policy because it had never opposed his nationalist policies. STOJANOVIĆ, ULJE NA VODI 216.



† That is why Koštunica was chosen to run against Milošević: Though not the leader of the largest party, Koštunica was both a hard-core oppositionist and a hard-core nationalist, so no one could pin the “traitor” label on him. On Serb attitudes toward and knowledge of crimes during the wars, see Bieber at 430-433.

‡ In the months after 5 October, the security situation could best be defined as a duality of governance. Koštunica controlled the military, while command of the SDB was divided at the republican level. Đinđić at least nominally controlled the JSO, and their leader, Milorad “Legija” Ulemek Luković, only until Milošević was transferred to the Tribunal; at that point, under pressure, Legija went over to Koštunica, who gave support to Legija and the *Crvene Beretke*’s armed insurrection in November 2001. To stop the insurrection, Đinđić was forced to fire the heads of the SDB and to put in their place Legija’s two men, Andrija Savić and Milorad Bracanović, whom Legija could control; as a result, Đinđić lost protection. For further discussion of the security situation at this time, see *The Unit: The Untold Story of the Red Berets* (Episode 3: “The Final Settlement”), B92 and VREME, [http://www.b92.net/specijal/jedinica-eng/3\\_epizoda.php](http://www.b92.net/specijal/jedinica-eng/3_epizoda.php).

§ The Coalition consisted of 18 political parties. The leading two were the *Demokratska stranka* (Democratic Party or DS), led by Zoran Đinđić, and the *Demokratska stranka Srbije* (Democratic Party of Serbia or DSS), led by Vojislav Koštunica. The remainder were very small groups, only some of which, such as the *Građanski savez Srbije* (Civic Alliance of Serbia or GSS), had opposed Milošević's war policies in the nineties. I was president of the GSS from 1992 to 1999.

\* *See also* Várady at 460-461 (discussing some of the technical objections to transfer).

† The Prosecutor of Serbia never put together an indictment of Milošević for financial misconduct—the official reason he was originally arrested—even after Milošević had spent three months in prison on remand.

‡ The pressure from the United States was immense. Đinđić was told that Washington would not change its approach to Belgrade as long as Belgrade did not change itself, which meant, inter alia: arresting and transferring Milošević to the Tribunal, ending financing for the VRS, and releasing Kosovar Albanian prisoners. JOVANOVIĆ, MOJ SUKOB ZA PROŠLOŠĆU 62.



\* No definitive legal determination concerning Đinđić's assassination was issued for several years, but, it was generally (and accurately) believed from the start that elements of the *Crvene Beretke* were involved. This view was widespread in Serbian liberal political and intellectual circles at the time we are discussing; typical was this view from Jelena Subotić: "[I]t was shocking to learn that those conspiring to assassinate Đinđić had called their operation 'Stop the Hague,' clearly demonstrating that Đinđić was murdered in order to prevent future investigations and transfers to The Hague." SUBOTIĆ, OTIMANJE PRAVDE: SUOČAVANJE S PROŠLOŠĆU NA BALKANU 93; *see also* Stephen, *Regional Report: Motive for Djindjic Murder Emerges*, IWPR, 22 Feb. 2005, <http://iwpr.net/report-news/regional-report-motive-djindjic-murder-emerges>. Sentences were handed down for Milorad "Legija" Ulemek and other former members of the *Crvene Beretke* in 2007. *See* Jovanovic, *Djindjic's Killers Convicted, Sentenced after 3 1/2-Year Trial*, SETIMES.COM, 24 May 2007, [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2007/05/24/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/05/24/feature-01).

\* The intent of the *Crvene Beretke*'s armed insurrection—to destabilize the Serbian government, overthrow it, and prevent further transfers to the ICTY, using the indictments as a rallying point to gain wider support—was set forth by Serbian Prosecutor Jovan Prijic in his indictment of Legija and others for the assassination of Prime Minister Zoran Djindjic, in which he described the insurrection as the preparatory phase for the assassination of Prime Minister Djindjic. See *Special Prosecutor's Office for Organized Crime: The First Six Years 20–28* (Radisavljevic, Bonabello & Stanisavljevic eds.); see also *The Unit: The Untold Story of the Red Berets* (Episode 3: “The Final Settlement”), B92 and VREME, [http://www.b92.net/specijal/jedinica-eng/3\\_epizoda.php](http://www.b92.net/specijal/jedinica-eng/3_epizoda.php); *Serbian Court Confirms Sentences for Djindjic's Killers*, SETIMES, 29 Dec. 2008, [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2008/12/30/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2008/12/30/feature-01).

\* Dr. Florian Bieber is Professor for Southeast European Studies at the Centre for Southeast European Studies, Karl-Franzens Universität Graz. He is the author of *Nationalismus in Serbien vom Tode Titos bis zum Ende der Ära Milošević* (Lit Verlag 2005) and *Post-War Bosnia: Ethnic Structure, Inequality and Governance of the Public Sector* (Palgrave 2006).

\* There continued to be spikes when interesting witnesses appeared at the Tribunal. Stojković, *Like a Freak Show*.

\* *YU Info* was a minor station, created in 2000 by the Milošević regime to challenge the Đukanović government in Montenegro and subsequently became a federal news channel without a large reach due to limited programming. The station declared bankruptcy in 2003. *See* Media Centre, *Media on Media*, May 7, 2003.

\* The leaders of DOS mostly had positive ratings between 43 percent (Đinđić) and 85 percent (Koštunica) in late 2000, declining to around 34 percent (Đinđić) and 49 percent (Koštunica) in July 2002. Centar za proučavanje alternativa, *Prevaricating Politicians*, July 2002, at 14.



\* In 1996, 1997 and 2000, SPS ran in pre-election coalitions, in 1996 and 1997 with JUL and New Democracy, in 2000 with JUL, in 2008 with PUPS and JS. CeSID, <http://www.cesid.org>; Republička izborna komisija, [http://www.rik.parlament.gov.rs/cirilica/propisi\\_frames.htm](http://www.rik.parlament.gov.rs/cirilica/propisi_frames.htm).

\* SPS voters had a higher than average ethnic distance towards other nations (even exceeding SRS supporters in regard to some nations), but are also the least religious. *See* Kuzmanović, *Autoritarna svest kao ometajućičinilac u razvoju demokratskih institucija*, in PROMENE VREDNOSTI I TRANZICIJA U SRBIJI: POGLED U BUDUĆNOST 127 (Zoran Lutovac ed., 2003); Dijana Vukomanović, “Ideološke matrice političkih partija u Srbiji (1990–2007),” in IDEOLOGIJA I POLITIČKE STRANKE U SRBIJI 82 (Lutovac ed.).

† A similar dynamic occurred with the SRS, which lead to the open conflict between Šešelj and the acting party president, Nikolić, following Šešelj's detention and trial at the ICTY.

\* The rise of the SRS in 2003 was in fact less dramatic than was generally believed via electoral data analysis at the time. *See Bieber, Serbien zwischen Europa und Kosovo. Politische Entwicklung nach der Unabhängigkeit des Kosovo*, 56 SÜDOSTEUROPA 318 (2008).

† This was confirmed in 2012 when in parliamentary elections the *Srpska napredna stranka* (Serbian Progressive Party) formed from the moderate wing of the SRS in 2008, eclipsed the SRS and became the largest party. The SRS itself failed to gain parliamentary representation.

\* This also included the Prosecution's decision to use as key witnesses in the opening phases of the trial political opponents of Milošević and individuals representing other parties to the Yugoslav conflict, such as Stipe Mesić and Mahmut Bakalli. *See* SELL, SLOBODAN MILOSEVIC AND THE DESTRUCTION OF YUGOSLAVIA 364–70. Boas and Prelec, in particular, address the Prosecution's Greater Serbia theory.



\* Compare this to the social and linguistic dynamics Surroi and Del Ponte describe, in which Milošević dominated Albanian-speaking witnesses.

\* On July 9, 2005, the SRS screened the film *Istina* (Truth) at Sava Centre with prominent nationalist intellectuals and politicians present, as well as Patriarch Pavle. The screening and the film itself is available online at <http://video.google.com/videoplay?docid=-6431302053204441995>. See also *Hronologija zla*, GLAS JAVNOSTI, July 10, 2005. See also Gordy, *Shocking, Yes. But Is It Transformative?*, TRANSITIONS ONLINE, June 23, 2005, <http://www.tol.cz/look/TOL/article.tpl?IdLanguage=1&IdPublication=4&NrIssue=121&NrSection=2&NrArticle=14216&tpid=8>.

† In a survey conducted after Milošević's death, a majority of Serb citizens listed Serbs as fourth on a list of nations which had committed the most war crimes in the 1990s, following Croats, Albanians and Muslims. Đurić, "Odnos birača i apstinenata prema Haškom tribunalu i pomirenju."

\* One example is the extensive support granted to the RS by Serbia, both economically (e.g., the purchase of Telekom Srpske by Telekom Srbije in 2007) and politically (e.g., the opening of a school named “Serbia” in Pale in September 2009). *See* Bieber, “Territory, Identity and the Challenge of Serbia’s EU Integration,” *in* SERBIA MATTERS: DOMESTIC REFORMS AND EUROPEAN INTEGRATION 65–71 (Petritsch, Svilanović & Solioz eds.).

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\* *See* discussion, in Surroi and Trix, of the trial's linguistic dynamics.



† ARMATTA, TWILIGHT OF IMPUNITY 70, 434. This view stands in stark contrast to Anoya's account of the Tribunal's (and her own) efforts to bring Milošević into the trial process.

\* [Ch. 2](#) discusses this, at 38. Van der Wilt also discusses the complexities of applying JCE.

\* Hersch Lauterpacht Chair in Public International Law, Faculty of Law, Hebrew University. The research leading to this chapter has received funding from the Seventh Framework Programme under Grant Agreement no. 217589 (Impact of International Criminal Procedures on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC)). Thanks to Várady Tibor who provided very interesting comments; special thanks also to Shaun Bokhari, who assisted in editing, and to Joshua Asher for his help in researching this chapter.

\* For example, the U.N. Compensation Commission, established in the aftermath of the 1990–1991 Gulf War, channeled almost 30 billion U.S. dollars paid in reparations by Iraq to its war-related victims. UN Compensation Commission, Status of Processing and Payment of Claims (27 Jan. 2011), <http://www.uncc.ch/status.htm> (last visited 9 Mar. 2011). The recourse to a monetary compensation scheme may have been dictated in part by the inability to put Saddam Hussein on trial. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 48 (1999); Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 309–10 (2001).

\* The ICJ Proceedings initiated by the Republic of Bosnia and Herzegovina in 1993 were launched against the Federal Republic of Yugoslavia. Following the constitutional changes of 2003, the respondent country became the State Union of Serbia and Montenegro; and by the time the final judgment was issued, in 2007, Serbia and Montenegro were two independent states. After 1995, Bosnia dropped the appellation “Republic” from its name.

\* The unique interest of the state in limiting the exposure of its senior leaders to criminal prosecution before the courts of other states is reflected in head-of-state immunity rules, which shield the most senior serving state officials from the criminal jurisdiction of other states. *See* Arrest Warrant of April 11, 2000 at 20–21, *DRC v. Belgium*, 2002 I.C.J. 3. Although head-of-state immunity is closely linked to the need to facilitate regular diplomatic interaction between different states, it is also often justified by the *in parem non habet imperium* maxim. BARKER, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 148. Cases like *Pinochet* involve former heads of states—as did *Milošević*, by the time his trial began—and are therefore somewhat less problematic (as the diplomatic rationale no longer applies). But still, they entail, by necessity, a review of state conduct for the period of time during which they ruled.



† The new definition of aggression adopted by the ICC Review Conference in Kampala imposes criminal responsibility only on persons “in a position effectively to exercise control over or to direct the political or military action of a State”—that is, senior state officials. Rome Statute of the International Criminal Court, Art. 8*bis* (11 June 2010).

\* Other chapters—especially Dragović-Soso, Pešić, and Bieber—discuss this period.

\* Koštunica may have rightly assessed that a significant part of Serbian public opinion would object to the surrender of Milošević to the ICTY. Dobbels, *Serbia and the ICTY: How Effective Is EU Conditionality?* 17–18 (EU Diplomacy Papers, June 2009).

\* The decision appears to have contradicted federal Yugoslav law, which delegated to the federal authorities exclusive powers for administering the relationship with the ICTY; it was also in tension with a Constitutional Court injunction issued only a few hours prior to the transfer, which had suspended the effects of a federal decree on cooperation with the ICTY. See Magliveras, *Interplay between the Transfer of Slobodan Milošević to the ICTY and Yugoslav Constitutional Law*, 13 EUR. J. INT'L L. 661 (2002). Várady discusses these points in greater detail at 460-461.

† In her memoir, Del Ponte cites Goran Svilanović, the FRY Minister of Foreign Affairs, as openly acknowledging the close links between the two responsibility tracks. DEL PONTE, MADAME PROSECUTOR 173 (“He said that if Milošević were convicted of genocide, it would militate against Serbia and Montenegro in the lawsuits the Republic of Bosnia and Herzegovina and the Republic of Croatia had filed before the International Court of Justice”).

\* Such pressure included the initiation of specific ICTY proceedings against the FRY. *Milošević case*, Prosecution's Application for an Order Pursuant to Rule 54*bis* Directing the Federal Republic of Yugoslavia to Comply with Outstanding Requests for Assistance (13 Dec. 2002).



\* A similar attempt to rely on the *Milošević* proceedings was made by Croatia's legal representative in the course of the proceedings in the *Croatian Genocide* case in order to substantiate the FRY's control over the Serb enclaves in Croatia. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia), Written Statement of the Republic of Croatia, at 22 (29 Apr. 2003).

\* Prof. Tibor Várady is University Professor at the Central European University in Budapest, and Professor Emeritus at Emory University School of Law. Prof. Várady served as agent for the FRY (later Serbia) before the ICJ in a number of cases arising out of the Yugoslav conflicts.

\* The present 2006 Serbian Constitution does not contain norms that prohibit extradition.

† See Pešić's chapter for further discussion of the transfer controversy.

‡ Prelec's chapter, for example, advances a different reading of the VSO documents.

\* *See* Shany at 450.



\* Florence Hartmann is a journalist, and formerly chief spokesman and Balkan advisor to the ICTY and ICTR Chief Prosecutor. She is the author of *MILOSEVIC, LA DIAGONALE DU FOU* (1999) and *PAIX ET CHÂTIMENT, LES GUERRES SECRÈTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES* [PEACE AND PUNISHMENT: THE SECRET WARS BETWEEN INTERNATIONAL POLITICS AND INTERNATIONAL JUSTICE] (2007). She covered the Yugoslav wars for *Le Monde*. In 2008 Hartmann was indicted by the ICTY for contempt of court for exposing publicly how the ICTY judges had decided on Serbia's request to block publication of the VSO documents. She was convicted in September 2009, upheld on appeal in July 2011.

\* *Croatia* Indictment. *See* Boas and Prelec for a detailed discussion of the Prosecution's JCE theory.

† Much of the evidence is summarized in the Rule 98*bis* Decision rejecting the *Amici Curiae*'s motion for acquittal at the end of the Prosecution phase, which Nielsen and Waters discuss at length. *See Milošević case* (1) 98*bis* Decision (16 June 2004).

\* Jovica Stanišić, Franko Simatović, Vojislav Šešelj, and Momčilo Perišić for Croatia and Bosnia, and Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Sreten Lukić, and Vladimir Lazarević for Kosovo. Vlasto Stojiljković was indicted with Milošević but committed suicide before he could be transferred. Several high-level Serbian or FRY officials named as members of the JCE in the *Milošević* indictments were never indicted by the ICTY: Borisav Jović, Branko Kostić, Momir Bulatović, Veljko Kadijević, Blagoje Adžić, Aleksandar Vasiljević, and Tomislav Simović. Radovan Stojičić “Badža” was assassinated in 1997. Željko “Arkan” Ražnatović was indicted in secret in 1999 but assassinated the following year, before his indictment was made public. *Pros. v. Raznatović*, Indictment (23 Sept. 1997).

\* Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Nebojša Pavković, Sreten Lukić and Vladimir Lazarević.

\* The description of the case is based on the Prosecution allegations expressed in the indictment and in the Prosecution opening statements presented on 28 and 29 April 2008 and, after a long break, on 9 June 2009.



\* This is the capacious plasticity of JCE theory that Boas critiques, but regardless of whether one agrees with his view, in this case, any JCE that reaches Milošević would logically catch up the subordinates directly interposed between him and the crime base, as Stanišić and Simatović were.

\* The other municipalities cited in the Decision were Brčko, Prijedor, Sanski Most, Bijeljina and Bosanski Novi. Rule 98*bis* Decision ¶ 246.

\* Although some members of the Prosecution believed the Serbian and FRY state leadership had some effective control over the VRS through its command structures filled by VJ officers, others disagreed. All during the *Milošević* Prosecution case, the latter group used this additional argument to propose that genocide charges be dropped together with the Srebrenica section.

\* Radislav Krstić was found guilty of complicity to genocide, whereas in their first instance judgment in June 2010, Vujadin Popović and Ljubiša Beara were found guilty of genocide and Drago Nikolić of complicity in genocide in relation to Srebrenica. All of them were seconded VJ officers. *Pros. v. Krstić* (2), Judgment (19 Apr. 2004) [*Krstić case*, Appeal Judgment]. See also *Pros. v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, Pandurević*, Judgment Vol. 1 & 2 (10 June 2010) [jointly, *Srebrenica Judgments*]. Mladić, head of the VRS and Perišić's subordinate, has also been indicted for genocide. *Pros. v. Mladić* (1), Amended Indictment (10 Oct. 2002). The *Perišić* indictment identified Mladić as one of Perišić's subordinates. *Pros. v. Perišić* (2), Revised Second Amended Indictment ¶ 45 (5 Feb. 2008) (noting Mladić's relationship to the VJ 30th Personnel Center, under Perišić's control).

\* Namely Radislav Krstić. *See Pros. v. Perišić* (2), Revised Second Amended Indictment ¶ 39e (5 Feb. 2008).

† Perišić spoke with Mladić on the phone and even met with him during the attack; he received all VRS Main staff reports from the field and had direct information about activities in the Srebrenica region and continued to provide additional VJ personnel. *See Perišić case*, Opening Statement of the Prosecution, *supra* note 34. In early 2010, the Prosecution sought to put into evidence taped phone conversations between Mladić and Perišić and parts of Mladić's diary. In November 2009, the Prosecution put into evidence photographs taken on 18 July 1995 at the VRS Main Staff HQ in Crna Rijeka near Han Pijesak, showing Generals Ratko Mladić and Perišić together during the last days of the Srebrenica genocide. *See Pros. v. Perišić* (7), Trial Tr. 9533-620 (3 Nov. 2009) (seeking submission of a number of photographs authenticated in court by prosecution witness Ned Krajišnik); *Pros. v. Perišić* (9), Trial Tr. 9851, 1.13-9852, 1.15 (10 Feb. 2010) (seeking submission of Mladić's diary); *Pros. v. Perišić* (8), Trial Tr. 9560, 1.9-9573, 1.7 (3 Nov. 2009) (discussing photographs).



\* Among the VJ officers serving in the VRS and de jure subordinated to Perić were Mladić, Radivoje Miletić, Milan Gvero, Zdravko Tolimir, Ljubiša Beara, Radislav Krstić, Vujadin Popović, Vidoje Blagojević, Vinko Pandurević, Dragan Jokić, Dragan Obrenović, Drago Nikolić, all indicted or convicted in relation to the genocide in Srebrenica. *Id.* at ¶ 1667.

† In that regard, see *Srebrenica Judgments*, in which the Chamber, after confirming that genocide was committed in Srebrenica, discussed in depth the nature of each Accused's knowledge of the operations in order to establish precisely their different degrees liability in the genocide.

\* After the *Milošević* Prosecution phase ended, the Prosecution received the military personnel files of a number of VJ officers sent to serve within the VRS command; these were introduced in *Perišić*. The *Perišić* case extensively examined the operations of the 30th and 40th Personnel Centers within the VJ, and the ways in which the VJ and VRS functioned as one army. See, e.g., *Pros. v. Perišić* (1), Decision on Motion to Reopen the Prosecution Case and Tender New Evidence (4 Nov. 2010).

† In previous Srebrenica cases, the Prosecution had also submitted evidence that the order to attack and capture the enclaves was drafted by Radivoje Miletić, a VJ officer serving as Chief of Administration for Operations and Training at the VRS Main Staff. In *Milošević*, the Prosecution brought evidence indicating that this military operation was prepared in coordination with the VJ Užice Corps, so under Perišić's command and pursuant to the policies set up by the SDC.

\* For example, evidence submitted in *Milošević* indicates that on 7 July 1995, it was Mladić and not Karadžić who was called to a meeting with Milošević in Belgrade and a week later, with the massacres still underway, it was again Mladić who attended a meeting in Belgrade with Milošević and international officials. *Milošević case* (141), Trial Tr. 26981:13-17 (18 Sept. 2003); ARMATTA, TWILIGHT OF IMPUNITY 309.

\* Shany discusses this issue at length, as does Prelec.



† Interviews with Bosnian officials and lawyers, in Sarajevo, Bosnia-Herzegovina (2007–2009). These individuals—who were close to the Bosnian ICJ team—reasoned that, had Milošević been acquitted of genocide, it would have been difficult for the ICJ to find Serbia as a state liable, but by the same token, due to their reliance on ICTY jurisprudence in *Bosnian Genocide*, the ICJ’s judges would logically have felt similarly obliged to rely on a genocide conviction in one of the ICTY’s other cases against high-level Serbian officials.

\* Harmen van der Wilt is a professor at the University of Amsterdam, and was previously associate professor at the State University of Maastricht.

\* As Del Ponte notes in her chapter, “[w]e did not maintain that Milošević personally ordered individual atrocities in Bosnia and Croatia, rather we argued that he devised a broad criminal plan at a strategic level and implemented it, using his authority as President of Serbia and later of the FRY[.]” Del Ponte at 138.

† *Cf.* [Ch. 2](#) at 38 (noting the theoretical possibility that all Serbs indicted by the ICTY could be charged together under a JCE theory, a point Hartmann picks up on at 467 and 472).

‡ In her chapter, for example, Del Ponte notes that “[i]n the end we decided to apply the doctrine of ‘common purpose,’ first employed at Nuremberg and Tokyo in cases in which multiple perpetrators worked in concert to achieve a goal that involved criminal acts.” Del Ponte at 138.

\* After a meticulous analysis of the stenographic notes and transcripts of VSO meetings, Prelec concludes that “[t]hese VSO deliberations show that neither Milošević, nor any other VSO member, shared any of the Bosnian Serb leadership’s appalling goals with respect to Sarajevo, and that the VSO members considered the siege of Sarajevo a disastrous folly.” Prelec at 363.



\* Prelec at 374 (“the documentary record comprehensively disproves the Prosecution’s central claim: that Milošević controlled the principal commanders of ethnic cleansing—that is, the Bosnian Serb military and political leadership. Nor is there evidence that Milošević planned the Bosnian Serbs’ atrocities...with them, intended or even approved of their commission”).

† As Hartmann also notes, “the theory that Milošević foresaw a risk of genocide arising out of the actions of other JCE members presupposes at least *some* other members’ intentional perpetration of genocide.” Hartmann at 472 (emphasis original).

<sup>1</sup> Indeed, the more general lack of knowledge about the place whose conflicts the Tribunal was adjudicating was one of the reasons that, when designing this project, I sought to ensure a full representation by experts both on and from the region, as well as experts on the legal issues.

